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McMULLAN'S

LAW REPORTS.

TWO VOLUMES IN ONE.

CONTAINING CASES DETERMINED IN THE LAW COURT OF APPEALS AND COURT OF ERRORS IN SOUTH CAROLINA, FROM NOVEMBER TERM, 1840, TO MAY TERM, 1842, BOTH INCLUSIVE.

BESIDES SOME EARLIER CASES IN TWO APPENDIXES.

SECOND EDITION.

WITH NOTES REFERRING TO THE STATUTES AT LARGE AND TO CASES IN THE

SOUTH CAROLINA REPORTS.

CHARLESTON, S. C.:
McCARTER & DAWSON, 116 MEETING STREET.
1860.

ADVERTISEMENT.

THIS reprint is made under a contract which we have entered into with public authorities. Nothing that the Reporter chose to publish has been omitted; but, by the aid of a friend, who is connected with the Courts, a hasty revision has been made. Many errors have been corrected in the opinions of the Judges, which, through blunders of Printer, Copyist or Reporter, crept into the former edition, and often marred the sense. A new table of cases has been prepared; but the abstracts of the Reporter have been necessarily left as they were, except a few alterations, where, by the omission of *not*, or some such material departure from what was desired they were likely to mislead. Numerous false references have been set right. The statutes at large have been cited once in every case, where a statute was referred to. Where the same case is to be found several times reported, the former or subsequent report has been noted. To most of the cases have been added notes referring to other cases, sometimes by name, but most frequently (for want of time and for fear of misprint) only by volume and page. The cases thus referred to are additional to those which may be found cited any where in the report of a case to which a note is appended. They are almost entirely confined to the South Carolina Reports, and for the most part, to the Reports subsequent to McMullan. In them will usually be found some overruling, modification, confirmation, or explanation of the case reported—but sometimes only a citation of the case reported, or an observation upon some subject considered in it, or some kindred subject.

The notes of the Annotator, to distinguish them from the matter in the original Reports are marked *An.*

We feel confident that a comparison of the two editions will show a great improvement in this; but, we lament that the nature of our contract, the difficulty of procuring a competent person in time to make a complete revision, and the death of Mr. McMullan, (who might have dealt more freely with his own work,) leave room for any one to say, that these Reports are not all they might have been made.

McCARTER & DAWSON.

Charleston, 1859.

JUDGES AND OTHER LAW OFFICERS DURING THE PERIOD COMPRISED IN THESE REPORTS.

Judges of the Courts of General Sessions and Common Pleas, called Law Judges, who, or a majority of whom, assembled *in banco*, constituted the Law Court of Appeals after December, 1836.

Hon. RICHARD GANTT, (*a*)	Hon. JOSIAH J. EVANS,
" J. S. RICHARDSON,	" BAYLIS J. EARLE,
" JOHN B. O'NEILL,	" ANDREW P. BUTLER,

Hon. DAVID DAVIS WARDLAW. (*b*)

Chancellors who, or a majority of whom, constituted the Equity Court of Appeals after December, 1834.

Hon. DAVID JOHNSON,	Hon. JOB JOHNSTON,
" WILLIAM HARPER,	" BENJAMIN F. DUNKIN.

The ten Law Judges and Chancellors, or a majority of each bench assembled in one chamber, constituted the Court of Errors, after December, 1834.

The ten, or a majority of each bench, (not including the Judge or Chancellor from whose judgment the appeal was taken,) constituted from the end of December, 1835, till the end of December, 1836, a Court of Appeals for both Law and Equity.

From 1824, till December 18th, 1835, there was a separate Court of Appeals, consisting of three Judges, which heard cases in both Law and Equity. This, at its dissolution in 1835, was composed of Judges D. Johnson, Harper, and O'Neill, above mentioned.

Henry Bailey, Esq., Attorney General prosecuted in the *Charleston Circuit.*
(*c*) Thomas Jefferson Withers, Esq., Solicitor, *Northern Circuit.*
(*c*) Thompson T. Player, Esq., } Solicitors, *Middle Circuit*, afterwards called
(*d*) Thomas N. Dawkins, Esq., } *Northern.*
James John Caldwell, Esq., *South-Western*, afterwards *Middle.*
Joseph Newton Whitner, Esq., *Western Circuit.*
Alexander R. McIven, Esq., *Eastern Circuit.*
John D. Edwards, Esq., *Southern Circuit.*

There were at no term more than six Circuits, but, at various terms there were different arrangements of the Districts into Circuits, and changes of the names of Circuits.

Thomas J. Gantt, Esq., *Clerk of the Court of Appeals at Charleston.*
Alexander Herbemont, Esq., *Clerk of the Court of Appeals at Columbia.*

(*a*) Resigned December, 1841.
(*b*) Elected December, 1841, in room of Judge Gantt.
(*c*) Declined re-election.
(*d*) Elected in 1836.

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REPORTS OF CASES AT LAW,

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

SOUTH CAROLINA,

FROM NOVEMBER, 1840, TO MAY, 1841, BOTH INCLUSIVE.

TO WHICH ARE ADDED SOME CASES OMITTED BY FORMER REPORTERS

FROM 1835 TO 1840.

BY J. J. M'MULLAN,

STATE REPORTER.

VOLUME I. SECOND EDITION.

CHARLESTON, S. C.
M'CARTER & DAWSON, 116 MEETING STREET.
1860.

PREFACE TO THE FIRST EDITION.

The Reporter feels that it is due, to himself and the public, to state that this volume of Law Reports would have made its appearance much sooner, but from the fact, that he has been laboring under a serious indisposition, almost entirely since the last May Term of the Appeal Court; another reason has been the preparation of the omitted cases, and the delay consequent upon their publication. These were circumstances over which he had no control, and he trusts that they will have their proper weight, with those immediately interested in the appearance of the work.

Any apparent inaccuracies which may be found in this volume, he confidently trusts, will, from that generous spirit which has always characterized the bench and bar of South Carolina, be overlooked, and attributed to his indisposition and inexperience, rather than to any want of inclination or real negligence in the discharge of his duty.

J. J. McMULLAN.

Lancaster, C. H., 10*th November*, 1841.

CASES AT LAW

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA.

Columbia, Fall Term, 1840.

JUDGES PRESENT.

HON. RICHARD GANTT,
" JOHN S. RICHARDSON,
" JOHN BELTON O'NEALL,
HON. BAYLIS J. EARLE,
" JOSIAH J. EVANS,
" ANDREW PICKENS BUTLER.

DAVIS *vs.* RUFF.

Defendant was arrested and in the custody of the Sheriff by virtue of a *ca. sa.*, at the suit of the plaintiff, and had rendered in his schedule according to law, but refused to assign it. *Held*, That by his refusal to assign his schedule, he has not forfeited his right to remain within the prison bounds.

Before EARLE, J., at Fairfield, Fall Term, 1840.

The defendant had been arrested on a *capias ad satisfaciendum*, at the suit of the plaintiff, and had given bond for the bounds. He rendered in a schedule within the forty days, and after the expiration of the ten days, in pursuance of the Clerk's notice, the plaintiff claimed an assignment and delivery* of the effects rendered in, which the defendant refused to make, and still enjoys the benefit of the bounds. The [*2 plaintiff obtained a rule against the defendant and the Sheriff; on the return of which, I was of opinion that the remedy of the plaintiff was ample as well as obvious, without resorting to the order of the Court. I was satisfied that the defendant, by refusing the assignment, forfeited his right to the bounds, but that the Commissioners should have remanded him, or that the plaintiff might now proceed to retake him by another *capias:* that the application to the Court to interfere in the present state of the case was premature and irregular.

The order submitted. Upon hearing the returns of the defendant and D. J. Wylie, Esq., late Sheriff of Fairfield, to the rules in this case, it is

Ordered, that the Sheriff of Fairfield do take the defendant, David H. Ruff, and keep him within the walls of the jail until he shall make the said assignment ordered by the Commissioner of Special Bail, or pay the debt and costs in said case.

The refusal to grant the order. The within motion was made at Winnsboro', and was refused.

The motion of appeal. The plaintiff gives notice that he will move the Court of Appeals to reverse the decision of his Honor, the presiding Judge, refusing to grant an order, requiring the sheriff to take the defendant, and keep him within the walls of the jail until he shall make the said assignment, ordered by the Commissioner of Special Bail, or pay the debt and costs in the above case; because, by the law and practice of the Court, such an order should have been made.

Curia, per EVANS, J. The question which has been argued, and that which I propose to discuss and decide, is, whether the defendant, Ruff, has forfeited his right to remain within the prison bounds, by his refusal to assign his schedule. Before the Act of 1788,(*a*) commonly called the Prison Bounds' Act a defendant arrested on a *ca. sa.* was confined within the walls of the jail, and could be relieved from imprisonment only by
*3] paying the debt, or a discharge under the Act of 1759.(*b*) *The great object of the Act of 1788, seems to have been, to alleviate the harshness and severity of the common law imprisonment, by providing an expeditious mode of discharge, on a surrender of his property, and also to enlarge the limits within which he was to be confined, upon his giving to the Sheriff satisfactory security to remain within the prison limits. The defendant contends that those two provisions are independent of each other. He may apply for his discharge without having availed himself of the prison bounds, and he may enjoy the privileges of the bounds without assigning his schedule.

By the 2d section of the Act, a prisoner confined on mesne process may be admitted to the bounds, upon his giving to the Sheriff satisfactory security not to go or be without the prison rules; and by 3d section, prisoners in execution may be admitted to the same privileges on the same terms, with the addition that they will, within forty days, render to the Clerk of the Court a schedule, on oath, of their whole estate, or so much as will pay and satisfy the sums due on the executions on which they are confined. By the 4th section, the Clerk of the Court, within ten days after the receipt of the schedule, is required "to give public notice that the prisoner will be liberated and the property assigned, unless satisfactory cause to the contrary be shown before one or more of the Judges of the Court where the process originated, or one or more of the Commissioners of Special Bail in the circuit districts." And if no satisfactory cause be shown, the Judge, or Justice, or Commissioner of Special Bail, before whom the prisoner may be brought, shall order an assignment of the prisoner's estate, and the prisoner shall thereupon be discharged. In this case, no application for a discharge has ever been made by Ruff, nor has any order been made that he should assign his schedule. If such an order had been made by competent authority, and the defendant had refused compliance, he might have been ordered into close confinement for his disobedience. This clause does not take away his right to the

(*a*) 5 Stat. 78. *An.* (*b*) 4 Stat. 86. *An.*

bounds, but merely makes the assignment of his schedule a condition precedent to his discharge. By the 7th section, if a prisoner committed on execution shall not give in a schedule agreeably to the tenor of his bond, he shall no longer be entitled to the benefit of the prison rules, but his bond shall be forfeited *and assigned to the plaintiff. But this section can only apply, I apprehend, to those cases where he has [*4 rendered no schedule, or where the schedule, on a trial before a competent tribunal, has been found to be false. By the 11th section, in cases of escape, the plaintiff may proceed by recaption of the defendant; I suppose, by issuing new process against him. These are all the provisions of the Act which can have any application to the defendant's case. It is not pretended he is guilty of an escape, and, therefore, the 11th section does not embrace his case. He has never applied for a discharge, and no order has been made that he should assign his schedule, and, therefore, no process can issue for a contempt. No suggestion that his schedule is false has ever been filed, and no proceedings have been had to establish the fact. The case, then, stands thus: The defendant, Ruff, agreeably to the tenor of his bond, has filed a schedule of his estate, the truth of which the plaintiff has not controverted: he chooses to remain within the bounds, and declines to apply for a discharge, or to assign his schedule. Is there anything in this which deprives him of the benefit of the bounds? Upon a careful review of all the provisions of the Act, I am constrained, contrary to my first impressions, to come to the conclusion that the defendant has done nothing to forfeit his right to remain within the bounds; and such, it seems, has been the practical construction of the Act; for some of my brethren remember more than one case where debtors have lived for years within the prison rules, without applying for a discharge or assigning their schedule. It may seem strange that the law should require the prisoner to render a schedule, and the Clerk to give notice to the creditor, unless it was intended he should assign his effects for the payment of the debt. But I am not at liberty to supply the omission of what I may conjecture was intended. I cannot look beyond the Act for its construction.

The motion is, therefore, refused: the whole court concurring.

Gregg for the motion. *Clarke*, contra.

See Act of 1841. 11 Stat. 153. *An.* 4 Rich. 13, 296. *An.*

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*Mary Ellison *vs.* Robert Cathcart. [*5

Possession and the payment of the purchase money is a good equitable title, and a possession of ten years under such a title is good under the Statute of Limitations.

Before Earle, J., at Fairfield, Fall Term, 1840.

Trespass to try title.

It was admitted that the title to the *locus in quo*, was originally in William Ellison, from whom plaintiff derived title. The defendant

claimed to derive title also from William Ellison, under a parol agreement to sell, between him and James Barkley, with ten years' possession. The evidence on that point was as follows: Samuel Barkley deposed, that in February or March, 1830, he heard William Ellison say, that he had, several years before, sold to James Barkley a small piece of land (which, on examining the plat, he recognized to be the same now in dispute, seven and three-quarter acres,) but they had entered into no writings; that there was a settlement pending, or to be had, between them; that Barkley owed him for the land, and also for some fodder, and he owed Barkley a store account, and he did not suppose there was much difference. But he intended to have a settlement with him, and draw writings. There was no evidence of any subsisting agreement that the price of the land should be set off against the account, and no evidence of any subsequent settlement where their mutual demands were balanced and extinguished. No written agreement was entered into, and no conveyance executed.

As early as 1822 or 1823, Barkley, who owned an adjoining plantation, had run his fence rather within the line, on Ellison's side, for some distance, through woods, and at the corner had enclosed about half an acre, which had been continually cultivated from that time forward to the commencement of the suit; but no further possession was proved until within four years, when the whole was cut down and enclosed. There was no proof that any actual possession was taken or held under the parol agreement, the date of which was left entirely uncertain, beyond that already described, which, it was clear from the evidence, must have existed before, and was originally accidental. This, however, cannot be
*6] an important feature in the case, as it turned on another *point. I instructed the jury, that under a parol agreement for the purchase of land, such as was proved in this case, the possession of the purchaser, when he enters under it, is only a tenancy at will, until the payment of the purchase-money, and does not become adverse until that event; and that if they were satisfied on the proof, that the purchase-money was not paid, or that there had never, after 1830, been any settlement between Ellison and Barkley, by which their mutual demands were balanced and extinguished, then the possession of Barkley had not become adverse, and would not enable him to hold, although it may have continued ten years. I informed them that an actual possession of twenty years, under such an agreement, would authorize a presumption of payment and a conveyance, but there seemed no proof here on which such a presumption could be raised. The jury found a verdict for the plaintiff. The grounds of appeal seem to require no particular remark.

Defendant appeals, and moves for a new trial, on the following grounds:

1. Because the Circuit Court erred in charging the jury that the possession of defendant's lessor, under a parol sale, could not avail him without proof of the actual payment of the consideration in money; and that until the same was paid, he was only a tenant at the will of the vendor, and the Statute of Limitations would not run in favor of his possession.

2. Because, if the above rule be correct, (that the Statute of Limitations will not commence to run in favor of a possession under a parol sale of lands until the payment of the consideration money,) there was ample proof in this case that the consideration for the land was paid before or at the time of the sale.

3. Because the Circuit Court charged the jury that inasmuch as the lessor of the defendant was in possession of the land before his purchase, his after possession could not be considered in pursuance of his purchase, and therefore the Statute of Limitations could not avail him.

4. Because there was no proof that the lessor of the defendant was in possession of the land before his purchase; and,* therefore, if the rule laid down by the Court be correct in this respect, it was not supported by the facts of the case. [*7

5. Because the Court charged the jury that it was in the power of the lessor of the defendant to put an end to the contract at any time before the payment of the consideration money; and therefore the Statute of Limitations would not commence to run until the same was paid.

6. Because the Court charged the jury that the possession of the defendant's lessor was merely accidental, although there was satisfactory and clear evidence that there were marked lines designating the extent of defendant's claim.

7. Because the Court charged the jury, that even admitting the defendant's lessor had been in actual possession of the whole of the land in dispute from the time proved, the Statute of Limitations would not commence to run in his favor until the consideration money for the land was paid.

8. Because the verdict is contrary to law and equity, and against the evidence of the case.

Curia, per EVANS, J. The general rule is, that he who enters by the permission of the owner of the land, cannot acquire a title under the Statute of Limitations so long as the relation between the parties remains unchanged. It is not disputed that he who enters under a contract to purchase, where it is understood that the seller is not bound to make the title until the purchase money is paid, is but a tenant at will until he performs the condition; but whenever he has paid the price, the relation between them is changed, and from thence forward, at least, the tenant holds in his own right. So also, if the purchase money be paid at or before the commencement of the possession, there would be no pretence to regard the tenant as not holding in his own right. It appears from the evidence that Ellison, the vendor, said, in 1830, that several years before that time he had sold the land, by parol, to Barkley; that Barkley owed him for the land and some fodder, and he owed Barkley a store account, and he did not suppose there was much difference between them, but he intended to have a settlement with him, and to draw writings. On reference to Barkley's books, it appeared that as far back as 1819, a store account of Ellison's stood open to an amount greater than the price of the land. No other construction can *well be placed on these declarations, but that the account, which was probably due at the time the land was sold, was to be accepted as a payment on account of the land; and if the money be paid, it must be wholly immaterial how the fact is established. Possession and the payment of the purchase money, is a good equitable title; and a possession of ten years, under such a title, is good under the Statute of Limitations.(*a*) The Circuit Judge seemed to have entertained the opinion that until there had been a settlement between the parties, by which their mutual accounts had been balanced and extinguished, the statute would not commence to run. In the view which I take of the case, a settlement of their mutual accounts was wholly immaterial. If the debt was paid, it was sufficient, provided [*8

(*a*) See *Bank* vs. *Smyers*, 2 Strob. 28. *Kimbrell* vs. *Walker*, 7 Rich. 429. *Sumner* vs. *Murphy*, 2 Hill, 488. *An.*

satisfactory evidence of the fact was produced. Some of the authorities go so far as to say, that whenever the debt is extinguished, even if it be by the Statute of Limitations, the possession becomes adverse; and of this there can be no doubt, where the payment of the purchase money is not a condition precedent. In the particular above stated, I think there was error in the charge of the Circuit Judge, and the motion is therefore granted.

GANTT, RICHARDSON, O'NEALL, BUTLER, JJ., concurred.

Clarke and *McDowell*, for the motion. *Woodward*, contra.

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*9] *A. PUTNAM (holder) *vs.* E. CRYMES and R. K. OWINGS.

Holder is a word of the same import as bearer: by either of these words, or other equivalent ones, a promissory note may be made negotiable by delivery.

Before BUTLER, J., at Laurens, Fall Term, 1840.

Judges' Report.

The plaintiff in this case was not the original payee, but held the note by transfer to himself by delivery. The note was made payable to Mancil Owens or *holder;* the plaintiff declared as *holder*, and defendants demurred on the ground that the holder could not sue without a written assignment. I regarded *holder* as synonymous with *bearer* and overruled the demurrer.

Appeal by Defendants on the ground that the demurrer should have been sustained.

Curia, per BUTLER J. The word bearer is usually inserted in a negotiable note, transferable by delivery. But without it, the maker of a note may make it transferable by delivery, either by circumlocution, or using a word of precisely the same import. As if a note were made payable to A. B. or to any one to whom he may deliver it; or to any one who might hold the same by delivery. In both cases the bearer would be sufficiently meant and designated, although the word was not used. If it was the intention of the maker to make it payable to any one who acquires possession by delivery, he has no right to complain when it is presented to him without a written transfer. *Holder* is a word of the same import as bearer, and both may acquire a title by lawful delivery, according to the terms of the contract. All the law requires is, that the paper must have negotiable words on its face, showing it to be the intention to give it a transferable quality by delivery; otherwise the instrument
*10] must be transferred by *written endorsement, if payable to order; or sued on by the original payee, if there are no negotiable words at all.

The decision below is affirmed: the whole court concurring.

Sullivan and *Campbell*, for the motion. *Irby* and *Wright*, contra.

JOHN D. MURRAY *vs.* G. S. PEAY—The same *vs.* the same—JOHN ROBERTSON, *et al.*, *vs.* GEORGE S. PEAY.

A defendant arrested under a *ca. sa.*, who gives the usual bond, for the bounds, and without rendering in a schedule, or satisfying the debt, breaks the bounds, may, by the Act of Assembly of 1839, be re-taken; or the plaintiff may proceed against the security on the bond: and if the security is insufficient, he may have his action against the Sheriff, who shall be ultimately liable.

It is not necessary to have the order of a Court, in addition to the ordinary process of law, which the plaintiff has a right to have issued for the purpose of caption; but, if the Sheriff should refuse to obey the usual process, the Court will, upon a rule, enforce it.

Before EARLE, J., at Fairfield, Fall Term, 1840.

His Honor made the following report:

The defendant, Peay, having been arrested on the writs of *capias ad satisfaciendum*, in the several cases above stated, gave the usual bonds for the bounds, and afterwards, without rendering a schedule, or satisfying the sums for which he was confined, went without the bounds.

On the return of a rule, which was served upon him, to show cause, the counsel for the plaintiff moved for an order of the Court to direct the Sheriff to re-take the defendant, and to confine him within the walls of the jail.

Conceiving that the course proper to be pursued by the *plaintiff, is plainly pointed out by Act, and that the interposition of the [*11 Court was unnecessary, I refused to grant the order, from which decision the parties appeal, and renew their motion in the Court of Appeals, upon the following ground:

Because, from the facts set out in the suggestions, and admitted by the defendant, he had forfeited his right to the prison bounds, and incurred the penalty prescribed by the order; and the proceedings were proper to ascertain and establish it in judicial form, and the order legal and necessary to impose the penalty upon the defendant.

Mr. Smart, for the motion, cited the third and seventh sections of the Prison Bounds' Act, (*a*); and contended that from these sections, the plaintiffs were entitled to confine the defendant in jail, and sue on the bond. He cited 3d M'Cord's Rep. 429.

He contended also, that until the schedule be filed, the Commissioner of Special Bail could not hear the case, and cited the 11th section of the Prison Bounds' Act, and 1 Hill's Rep. 432.

Mr. M'Call, contra, cited Tidd. 960.

If a party escape, or be rescued, he may be sued with a second execution.

Curia, per EARLE J. The Act of 1839,(*b*) re-enacting the provisions of the Prison Bounds' Act of 1788, in the same words, declares that, "upon an escape, the plaintiff may either proceed against the defendant, to re-take him, or against his security: or in case the security should prove deficient, against the Sheriff, who shall be ultimatety answerable in damages for such escape." The application of the plaintiff is to direct the Sheriff to re-take the defendant and confine him within the four walls of the jail. The order of the Court is surely not necessary to enable the

(*a*) 5 Stat. 78. *An.* (*b*) 11 Stat. 31. § 29. *An.*

defendant to be re-taken. The order of the Court is of no superior efficacy to the ordinary process, which, by authority of law, the plaintiff has a right to have issued, for the purpose of recaption, and would, therefore, be a superfluous interference. If the Sheriff should refuse obedience to
*12] such process, the Court, upon a rule, *would enforce it. It would be idle, as well as endless, for the Court, in anticipation, to make orders requiring public officers to do their duty. To require the Sheriff to confine the defendant within the four walls of the jail, would be to prejudge a question which may not be considered entirely clear, whether on such a recaption the defendant would be entitled again to the benefit of the bounds? When re-taken, the defendant will be in custody of the Sheriff, with such rights as the law gives him. It is always mischievous, as there is good reason for saying that it is incompetent, for the Court to interfere before hand, with its advice upon a point of law; to express an opinion before a case has arisen. The course of the plaintiff being plainly pointed out by law, we must leave him to pursue it; and also leave the Sheriff and the defendant untrammeled by any expression of opinion, as to the duty of the one, or the rights of the other.

The motion is therefore refused: the whole Court concurring.

See *Mack & Smith* vs. *Garrett*, 10 Rich. 80. *An.*

JOHN P. SELF *ads.* THOMAS DELOACH.

Where the damage to a horse, (which has been found within the enclosure of another,) appears rather the result of accident than design, and a decree for the plaintiff, for the damage, has been given—a new trial will be granted.

Before GANTT, J., at Edgefield, Fall Term, 1840.

This was a case of trespass within the summary process jurisdiction of the Court.

The plaintiff had lost three horses about the 26th September, 1839. They broke into a cornfield of Daniel Holland, for whom the defendant was overseer. The defendant put them in a lot or stable and kept them
*13] for several days, and not being *able to ascertain the owner, turned them out. Whilst in the lot, one of the horses was injured in one of the hind legs, near the hock. One of the witnesses for plaintiff, in giving defendant's conversation about the horses, said that the defendant informed him that he believed that the injury was done by a kick from one of the other horses. The injury was proved to have much impaired the value of the horse. The presiding Judge gave a decree for the plaintiff for $35.

The defendant moves the Court of Appeals to reverse the decree, on the following grounds, taken on the trial below:

1. That the circumstances of the case showed no trespass on the part of the defendant.

2. That if the plaintiff was entitled to any action at all, he was restricted to the action on the case prescribed by the Act concerning estrays, or to a suit for the penalty imposed by that Act.

3. Because the Statute of Limitations was a bar to the action.

Curia, per BUTLER, J. The legal question in this case arises out of the following state of facts: The defendant found horses in the enclosure of his employer; he caught and put them in a lot or stable, where he kept them for about three days; and during the time they were confined, one of them, a mare, was crippled, as it would appear, by a kick from one of the other horses. There was no evidence that the mare received any injury by the act, command, or volition of the defendant. He did not, directly or indirectly, commit any violence on the animal; but the injury which she received was in *consequence* of the confinement. Now, there could have been no trespass in the beginning; for any one may lawfully take up stock trespassing within his enclosure, either with a view of empounding them under the Act of 1827,(*a*) or proceeding under the law concerning estrays (*b*); or with a view of giving the owner, when known, information. It would be a hard proceeding to hold the person who has thus acquired the custody of stock, liable for an unintentionable injury which they may have received. If one died, and the injury was the result of negligence or unnecessary detention, an action on the case, or trover, might lie for damages, but not trespass, which *presupposes direct force, and a wilful wrong. Self had the license of the law in taking up the horses; and could only be held liable as a trespasser by a subsequent abuse of it. In such case, he might become a trespasser, *ab initio.* Notwithstanding the injury which one of the horses received, the defendant might have justified himself by impounding them under the Act of 1827; or by proceeding under the estray law; but, he was not bound to do either, if in *good faith* he turned them out, after he had ascertained their owner; or had determined to give up any claim on them for an injury which they may have done to his crop. If defendant had unnecessarily worked, rode, or in any wise wilfully abused the horses, he might have been made liable as a trespasser; but of this there was no evidence; on the contrary, the injury the mare received was rather the result of accident than attributable to design. [*14

Let the defendant have a new trial.

(*a*) 6 Stat. 331. (*b*) 5 Stat. 465. *An.*

JONES AND DANFORTH *vs.* A. G. COLVIN AND WIFE.

Where a daughter (an infant) resides with her mother, before marriage, it will be presumed that she was properly maintained, until the contrary is proved; for the mother is considered to be the proper judge of what is necessary for her, and should be consulted before a credit is given to her. *Vide Connolly ads. Assignees of Hull,* 3 M'C. Rep., 6 S. P.

Before GANTT, J., at Edgefield, Fall Term, 1840.

This was an action on merchants' account, for goods sold to Mrs. Colvin, whilst a minor, and before her marriage. The defendants pleaded infancy, to which the plaintiffs replied that the goods were necessaries. The plaintiffs proved their account. The defendants established the infancy of Mrs. Colvin at the time the goods were sold, and that she

*15] lived *with her mother and was properly maintained by her. The point made in the case was, that as Mrs. Colvin, whilst single and under age, lived with and was properly maintained by her mother, she could not bind herself to a stranger for necessaries. The jury, under the charge of the Judge, found a verdict for the plaintiffs.

The defendants appeal, and now move the Court of Appeals for a new trial, on the grounds taken upon the circuit.

Curia, per EARLE, J. The question raised by the motion seems to have been directly decided in the assignees of *Hull* vs. *Conolly* (3 McC. 6,) and indeed does not appear to have been then considered open for debate. In that case, as in this, the infant defendant lived with her mother, and although there was no proof that suitable maintenance was provided, yet Mr. Justice Nott held that it ought to be presumed, until the contrary be proved; that the mother was the fittest judge of what was necessary in the article of clothing, and that the plaintiff ought to have inquired into the circumstances, and consulted the mother, before he suffered the debt to be contracted. On that ground, mainly, was the new trial granted. In *Bainbridge* vs. *Pickering* (Bl. Rep. 1325), which was a similar action against a female defendant, not of full age, living with her mother, who provided properly for her, Gould, J., said the child, in such case, cannot bind herself to a stranger for what might otherwise be allowed as necessaries; and that no countenance should be given to such persons as enveigle young women into extravagancies, under the pretext of furnishing them with necessaries, without the previous consent of the parent. It was also held by Lord Kenyon, in *Ford* vs. *Fothergill* (1 Esp. Rep. 211), and by Ch. J. Best, in *Cook* vs. *Denton* (3 Car. and Pay. 114), and it would be of very mischievous consequence if the law were otherwise. The protection intended to be afforded to infants, against the improvidence natural to their inexperience, would be rendered ineffectual; and the discretion and judgment of the parent, in prescribing what the child shall wear, would be wholly superseded. In the case before us, there is no room for presumption, for the proof is, that the defendant's wife, for whom the goods were furnished, was suitably main-

*16] tained by her mother, *with whom she lived. The goods, therefore, in a legal sense, were not necessaries, and she could not bind herself to pay for them.

The motion is granted: the whole Court concurring.

S. W. BENTLEY *ads.* D. REYNOLDS.

Any words occasioning actual damage to one, are actionable, and it is not necessary that they should be defamatory.

Sed, this doctrine, however, must be taken subject to the *limitation*, that the injury complained of must not be the unlawful acts of others, because they are answerable themselves, and the damage sustained must be the immediate consequence of the defendant's words.

Before EVANS, J., at Union, Spring Term, 1839.

This was a special action on the case. There was a demurrer, which

had been overruled by Judge Gantt, at the extra Court the week before. I did not, in consequence, look into the declaration, but tried the case on its merits, which will be disclosed by the evidence. The facts of the case were these: The plaintiff was the owner of a plantation and several negroes, with horses and stock. He built two boats, with which he started to Columbia, about the 13th December, 1837, with an intention to carry freight to Charleston. On the 26th December, Bentley, the defendant, put up an advertisement, the precise words of which I do not recollect, but in substance represented himself as the owner of all Reynolds' property in case he did not return; and to some of Reynolds' creditors he said that Reynolds had gone to Ireland, or spoke of going there. In consequence of this advertisement, and the verbal statements of Bentley, all Reynolds' creditors sued out attachments and levied them on his property, and some small executions were levied, and a mare worth ninety dollars *was sold for ten. The plaintiff was not pressing the executions until the attachments were levied. Reynolds, in some way, [*17 got information of what was going on, and immediately came back and saved his property from sale, under the attachments, by issuing out a writ of replevin. He incurred some expenses and sustained losses in consequence of this conduct of the defendant. He paid a part of the costs of an attachment; but, in general, the plaintiffs paid the costs. He incurred the expenses of the writ of replevin. This was estimated, at least, at twenty dollars to the attorney, besides the cost of executing it. He had to confess a judgment to McClure for his debt. He lost about eighty dollars on the sale of his mare, which sale would not have been made but for the advertisement and rumors circulated by the defendant. The defendant attempted to justify all these things, by proving that Reynolds had executed a paper to him, whereby he appointed him his heir, or agent, to take possession of his property; and if he never came back, to be his forever. This was attacked as a forgery, or a fraud, and I presume was so regarded by the jury. I was of opinion, and so charged the jury, that the plaintiff could not, in this action, recover vindictive damages. The true measure of damages was the loss actually sustained. The proof of actual loss and expenses was: the cost he paid in one of the attachments, the cost of McClure's action against him, which he would not have sustained but for the defendant's conduct, the loss on the sale of the mare, and the expenses of the writ of replevin These might be estimated at more than $100. He had also incurred expenses in returning from Columbia, and losses by the detention of his property in the hands of the officers who had levied the attachments and executions. I thought, and so told the jury, they ought to give a verdict for all these, and any other losses or expenses which the plaintiff had sustained by reason of the defendant's conduct, without abating one cent from the amount which the evidence would warrant. The jury found for the plaintiff, $300. The notice of appeal is annexed.

Curia, per EVANS, J. This is an action on the case. The declaration sets out, with sufficient certainty, the following facts, viz.: 1. That the plaintiff, a citizen of Union district, *was absent from home, [*18 attending to some private business, at or in the vicinity of the town of Columbia. 2. That whilst he was thus absent, the defendant, falsely

and maliciously, and with intent to injure him, and to produce a belief amongst his creditors that the plaintiff was unable to pay his debts, and had absconded, and so concealed himself that the ordinary process of law could not be served upon him, said, of and concerning him, that the plaintiff had left the country, and would not return; that all his property, consisting of land and negroes, and other chattels, belonged to him, the defendant, until the plaintiff's return; and if he never returned, was his, absolutely. 3. That in consequence of these false reports, divers of the plaintiff's creditors, believing him to be an absconding debtor, sued out, and levied on his property, divers domestic writs of attachment, which they would not have done, but for the false statements of the defendant. 4. That by reason of the premises, the plaintiff was obliged to return, suddenly, to Union, leaving his business at and near Columbia unfinished, whereby he was put to great trouble and expense; and that he sustained great loss and damage in paying the costs of the attachments, and discharging his property from the liens thereof. To this declaration there was a general demurrer, which was overruled by my brother Gantt, at the extra Court for Union, in March, 1839, and the case came on for trial, before me, at the regular term of the Court the week after. On the trial, all the material allegations in the declaration were proved by witnesses, and the plaintiff had a verdict. The defendant appealed, and moved this Court to reverse the decision of the Circuit Court on the demurrer, on the ground that no action lies on the case made in the declaration and proved on the trial. There are some other grounds, but this is the only one which it is thought necessary to consider. The case has been held under advisement for some time, on account of some deversity of opinion among us. During this interval, I have turned my attention particularly to that class of wrongs, for remedy of which an action on the case lies, and the result of my examination has been, that the imagination of man can scarcely conceive of a case where one man has sustained a direct pecuniary loss by the unlawful act, the fraudulent conduct, or the malicious words, of another,(*a*) for which an
*19] action on the *case will not lie. The broad rule, as laid down in Comyn's Dig., is, "that where one man has sustained a temporal loss, or damage, by the wrong of another, he may have an action on the case, to be repaired in damage." I do not propose to consider the great variety of cases in which relief is granted in this form of action, but shall confine myself solely to the inquiry, whether the plaintiff's action can be sustained, according to the rules of law, and the authority of adjudged cases. To do this, we must understand the proper import of the defendant's words, as laid in the declaration, and proved on the trial. As I understand them, they mean: 1. That the plaintiff had conveyed to the defendant all his property, without making any provision for his debts, and consequently, intended to defraud his creditors. 2. That he had removed or was removing, out of the State, without paying his debts, and was therefore either an absent or absconding debtor. These words, if spoken of a merchant or tradesman, would have been actionable *per se*.(*b*) They are defamatory, for it is said in 1 Com. Dig., 261, (title action on

(*a*) *Campbell* vs. *Kinloch*, 9 Rich. 310. *An.*
(*b*) Cheves, 19. *An.*

the case, D. 25,) that for saying of a merchant or tradesman, "that he is fled and gone, and I shall lose my debt;" or, "that he is run away, and never will return," an action lies. Now, it cannot be questioned that defamatory words, which, if spoken in relation to one's trade or employment, are actionable *per se*, the same words, if spoken of another class of persons, are actionable, if the person of whom they are spoken has sustained, in consequence thereof, a direct pecuniary loss. But the authorities go still further than this. In Chitty's Practice, (1 vol. 44,) after enumerating the various classes of words which are actionable on the presumption of damage, and dividing them into four classes, he says: "5th, any words occasioning actual damage." Thus, in *Shepard* vs. *Wakeman*, (1 Lev. 58,) "Where the plaintiff was to be married to such a one who intended to take her to wife, and the defendant, falsely and maliciously, to hinder the marriage, wrote a letter to that person, that the plaintiff was contracted to him, whereby she lost her marriage. After verdict for the plaintiff, it was moved that the action lieth not, the defendant claiming title to her himself, like as Garad's case, 4 Co., for slander of title. But after divers motions, the plaintiff had judgment, for it is found malicious and false." This case fully sustains the text in Chitty, *that words occasioning actual damage, are actionable, and that it [*20 is not necessary they should be defamatory. This doctrine, however, must be taken subject to the limitation that the injury complained of must not be the unlawful acts of *others*, because they are answerable themselves, and the damage sustained must be the *immediate* consequence of the defendant's words. 8 T. R., 1; 2 Stark. Ev., 872.(*a*) In conclusion, I am satisfied the loss sustained by the plaintiff was the direct consequence of the false and malicious assertions of the defendant. It is so alleged in the declaration, and was so proved on the trial; and also, that the suing out the attachments was not such an act as would have sustained any action, against those who sued them out, by the plaintiff. It is alleged in the declaration, and the demurrer admits it, that the design of the defendant was to produce a belief among the plaintiff's creditors, that he had absconded, and so concealed himself that the ordinary process of law could not be served. He has no ground to complain that they believe him, and acted accordingly.

The motion dismissed.

GANTT, O'NEAL, EARLE, BUTLER, JJ., concurred. RICHARDSON, J., dissented.

Dawkins, for appeal. *Thompson*, contra.

(*a*) See *Kelly* vs. *City Council*, 4 Rich. 431. *Harrison* vs. *Berkley*, 1 Strob. 548. *Street* vs. *Augusta Insurance Co.* 11 Rich. Also cases cited 2 Rice's Dig. 295. *An.*

*21] *THOMAS LYLES *vs.* ADMINISTRATORS OF JAMES MCFIE.

A merchant having in store the cotton of divers persons to ship, does ship it, and it is lost by some means: *Held*, that assumpsit is the proper form of action to recover the price of the cotton.

Every person who undertakes any duty, trust, office, or employment, impliedly contracts with those who entrust or employ him, to perform his undertaking with skill, diligence and integrity; and the employer may maintain an action of assumpsit against him for an injury which he has sustained through the absence of any of these qualities.

Before GANTT, J. at Columbia, Spring Term, 1840.

This was an action of assumpsit to recover from the administrators of McFie, (a bailee) for loss which accrued in the shipment of thirty-two bales of cotton belonging to the plaintiff, and which by some means were lost to the owner—Mr. Floyd being the carrier.

In viewing the several grounds of appeal, all of which have reference to the record and the evidence, they must constitute my report. I have only further to add, that if the case admitted of a remedy by action, case and not assumpsit, would, in my view, have been the appropriate remedy. However this may be, it is very clear to my mind, that the evidence furnished by the trial was altogether insufficient in law to support the verdict which was found by the jury.

I enclose my notes of the testimony, and the counsel for the appellants will produce the record.

The defendants will move the Appeal Court to grant the motion for a nonsuit made in the Court below—

1. Because the action ought to have been case, and not assumpsit.

2. The declaration contains no count upon a naked bailment, and no proof of compensation for the shipping was offered.

3. Want of ordinary care and diligence could not be legally inferred from the evidence.

4. The case made was a naked bailment, and the facts proved did not amount to gross neglect.

5. If the verbal message sent by plaintiff's son amounted to specific instruc-
22] tions which the intestate was bound to obey, yet there was no count in the declaration upon which the intestate could be made liable for failing to comply therewith.

6. The plaintiff elected his remedy by suing the Insurance Company.

If the motion for nonsuit fail, the defendants will rely upon the foregoing, as well as the following grounds for a new trial:

1. That the intestate acted with good faith, and exercised due diligence.

2. That he did not know Floyd's character, at the time of the shipment, to be bad, nor was it shown to be so until after the loss of the cotton.

3. That the intestate insured the cotton, and thus obviated all risk from that cause, if any such risk existed.

4. That the message by the plaintiff's son did not amount to express instructions which the intestate was bound to obey; they were at most merely advisory.

5. There was no proof of wilful disobedience thereof.

6. The written instructions gave the intestate discretionary power both in relation to the shipment and sale.

7. The intestate wrote to plaintiff that he did not hold himself bound for the loss; plaintiff acquiesced in this, and instituted no suit against McFie in his lifetime, but, on the contrary, sued the Insurance Company.

8. If the intestate received from Kirkpatrick a part of his commissions, which is denied, yet that was no compensation moving from plaintiff, as to whom the case is a mere naked bailment.

9. The verdict was against the opinion of the presiding Judge.

Curia, per RICHARDSON, J. To the brief report of the presiding Judge, it may be necessary to add the following statement: On the 13th January, 1836, the intestate, James McFie, acting as the agent of the plaintiff, Thomas Lyles, and having in store, for him, thirty-two bales of cotton, to be sent to Charleston, shipped the cotton, together with forty-six other bales of cotton, belonging to J. McLemore, on board the boat of Jesse Floyd, himself, the said Floyd, being the patroon of the boat, as well as owner. The whole of the cotton disappeared, under circumstances which justified the suspicion *that Floyed had fraudulently converted the whole cargo into his own purposes. But Floyd [*23 alleged that the boat and cargo were burnt, by misfortune, on Cooper river. After shipping the cotton, James McFie used the precaution to have the cotton fully insured in Charleston; and, after the loss, a suit at law was brought upon the policy of insurance. But the suit failed, by reason of the alleged fraud of the patroon of the boat, *being also owner.* (See *Frazier & Co.* vs. *F. & M. Co.*, Cheves, 123.) James McFie departed this life, and Thos Lyles then instituted this action to recover the value of his thirty-two bales of cotton; and has recovered a verdict. The administrators appeal, and claim, first, a non-suit, upon the legal ground, that the action of assumpsit does not lie in such a case; and secondly, a new trial, upon the allegation that the evidence of the case is insufficient to support the verdict. Upon the question, whether the action of assumpsit does lie, and which has been gravely and impressively controverted on the part of the administrators, I have been unable, apart from the importance of the case, and the peculiar misfortune attending the cotton, to feel the difficulties supposed by the counsel. A merchant having in store the cotton of divers persons, to ship, let it be admitted, at his own discretion, does so ship it, and, of his own accord, has the cotton insured. I can perceive, in such a transaction, nothing but a contract, which has been either expressly made between the parties, or is plainly implied, by the undertaking and conduct of the merchant. Doing the work implies the contract. If the cotton had arrived safe, and been taken by the owners out of the hands of the consignee in Charleston, I cannot question that McFie might have brought his action, either for customary commissions, or, upon a *quantum meruit* for such services.

Suppose, on the other hand, that McFie had disposed of the cotton in any other way, as to his own use, or that of a third party, or sold or injured it. It is plain, that assumpsit upon an express or implied contract, would have been a proper form of action against him. It seems plain, then, to my understanding, that we are to look upon Mr. McFie, either as a professional merchant, factor or broker, acting in his calling, for the usual recompense, in money. In other words, as a bailee, for the hire of his services; which species of bailment warrants reasonable skill and diligence. In either character,* his own acts indicate a contract, [*24 express or implied, with the owners of the cotton. And assumpsit is a proper and legal form of action, in all such cases. "Every person," (says Leigh, p. 2,) "who undertakes any duty, trust, office, or employment, impliedly contracts with those who entrust or employ him, to perform his undertaking with skill, diligence, and integrity; and the employer may maintain assumpsit for any injury which he has sustained, through the absence of any of those qualities." See also, 1 H. Blk. 158;

8 East, 348; 3 Bl. Com. 163; B. N. P. 73; 2 Ch. 117; 1 Selw. 431. These authorities are, assuredly, conclusive, and leave no doubt, that assumpsit is the proper form of action in the case before the Court. From the same authorities, it is still more obvious, that the person employed is bound to perform his undertaking, with skill, diligence, and integrity. But let me add one more authority, to bring the general principle to the very case of McFie, as a merchant to forward goods for his principal. Chancellor Kent says, (vol 2, p. 501,) "Justice Story divides the head of "Locatio," into "*Locatio faciendi operis*," (hire of labor and services,) and, "*Locatio custodiæ*," &c. He includes under the last head, &c., "warehousemen and wharfingers. And to these may be added a class of bailees, known in this country by the term forwarding-men, or merchants." "They are all responsible for want of good faith, of reasonable care, and ordinary diligence." This rule of law brings us to the consideration of the second head of the appeal, which involves the question, does the evidence justify the conclusion, that McFie failed in diligence or care?

Upon the motion for a new trial, as far as it depends upon the evidence, there is room for a difference of opinion. An impartial observer might well hesitate on which side to lay the burthen of so unlooked for a misfortune, as the loss of the whole cargo. Both parties appear morally blameless. But the cotton has been lost, to one, or both of them; and although, in all probability, the loss was owing to the misconduct of Floyd alone, yet the Court has to decide whether it shall fall on the plaintiff or the defendants, leaving the unfortunate party to look eventually, for redress, to Floyd. This Court does not adjudicate upon the evidence of the case, although it frequently orders a re-consideration by the jury. It is certain that McFie did, in fact, employ an unfortunate, *25] unsafe,* and very suspicious carrier; which, under the whole evidence adduced, gave ground for the conclusion, that he acted without reasonable skill and vigilance, if not with positive negligence; which would be enough to render him liable. Story Agency, 183; Livermore, 339; Sto. Bail. 4; Kent, and the cases there quoted.

The reply to this view was, that McFie insured the cotton, of his own accord. But such a precaution could not change the character of the original negligence. In reference to it, the insurance could only be intended for a remedy against consequences that might follow. In fact, the question often occurs to the mind—why did McFie insure *only* in this particular case, with this particular patroon, as set forth in his letter of 13th July, 1838? Does it not argue great consciousness that this cargo was in more than common danger? I think the fact of his insuring of his own accord, enforces the conclusion drawn against by the jury. He had been imprudent, and would try to prevent possible evil. But the question of his liability turns upon the original imprudence. If he was ever liable, he remained so, as well after as before, with or without insuring. And the jury having so found, the Court feels constrained to respect the verdict, as a legitimate conclusion from the facts.

The motion is therefore dismissed.

Evans, Butler, Earle, JJ., concurred.

Gantt, J., dissented.

Tradewell and *DeSaussure*, for the motion. *Black* and *Gregg*, contra.

*A. WATTS *vs.* WILLIAM TODD. [*26

Plaintiff was employed by defendant, to make a crop with him, in 1839, and was to receive for his services one-fourth of the crop made. About the last of August, a misunderstanding arose. Plaintiff was dismissed, and in September following, commenced this action: *Held*, that plaintiff, by commencing his action in September, after he was dismissed, treated the contract as being rescinded, and has waived his right to recover entire damages for the whole year; and has restricted his right of recovery to a compensation for his services on a *quantum meruit*.

Before EARLE, J., at York, Fall Term, 1840.

The plaintiff was employed by the defendant to make a crop with him, in 1839, and agreed to give him one-fourth. About the last of August, a misunderstanding arose, in consequence of an occasional absence of the plaintiff, and he was dismissed by the defendant from his employment, and refused permission to return, on his application to do so. On the 26th of September, he brought this action of assumpsit. There were two counts on a special parol agreement, and a general *indebitatus assumpsit* for work and labor. He claimed the value of his year's services, or the value of one-fourth of the crop.

It appeared in evidence, that there was a special agreement, in writing, differing in some slight particulars from the parol agreement set out in the declaration. For that reason, and also that the plaintiff had brought his action before the expiration of the term for which he had been employed, I held that he could only recover on the general *indebitatus assumpsit* count.

It was proved that the crop was laid by before the plaintiff was dismissed: and that five hundred bushels of corn were made, of which the plaintiff's share would have been one hundred and twenty-five bushels. To the value of this the jury added a reasonable allowance for his share of the fodder supposed to be made, there being no cotton or other crop planted. They then deducted the value of the plaintiff's services for the remainder of the year, and some other items of discount, which were proved to be due the defendant, which sums united, exceeded the value of plaintiff's share of the crop; and they found a verdict for the defendant. On the proof, I thought the plaintiff should have recovered something. Yet, if the jury could find less than the value of the year's *services [*27
on the *indebitatus* count, as they were instructed, I do not perceive that their mode of assessment was wholly unreasonable.

The grounds of appeal are subjoined.

GROUNDS OF APPEAL.

1. Because the jury, in rendering their verdict, estimated the labor of the plaintiff per month, lower than the testimony on that point would justify them.
2. That the verdict was entirely contrary to the evidence, there being no competent testimony on which they could render such a verdict.
3. Because the plaintiff should have been allowed for the whole year's labor; the defendant having dismissed him without cause.
4. Because there was not a particle of testimony to justify the jury in finding for the defendant, on the discount.
5. Because the jury gave a verdict contrary to the charge of the presiding judge.

6. Because his Honor charged the jury that the plaintiff could not recover for the whole year's labor.

Curia, per EARLE, J It is needless to refer to the well established rule on the subject of damages, in cases of entire contract. Such was the agreement between the plaintiff and defendant here. If the plaintiff had performed his contract to the end, he would have been entitled to his full wages for the year. So, also, if ready and willing to perform, he was prevented from it by the defendant, and dismissed without cause, he would have been entitled to full wages. But, in such case, he should treat the contract as subsisting to the end of the year; and could not recover upon it, until the expiration of the term for which he was employed. Without noticing the variance between the parol agreement declared on, and the written agreement proved in evidence, it is enough to remark, that the plaintiff, by commencing his action in September, immediately after he was dismissed, has treated the contract as being rescinded, and put an end to; has waived his right to entire damages for the whole year; and has restricted his right of recovery to a compensation for his services on a *quantum meruit*.

*28] *Although there may be some reason to suppose that the jury estimated the value of the plaintiff's services at a less sum than he did himself, and less than did some of his witnesses, yet, as they violated no rule of law, and adopted no arbitrary standard, there is no good reason to disturb the verdict.

The motion is therefore refused: the whole court concurring.

Witherspoon, for the motion. *Williams* and *Clawson*, contra.

See *Dillard* vs. *Wallace*, post. 484. *Ryer* vs. *Stubbs*, 1 Hill, 384; 5 Rich. 28, 466, 522; 2 Sp. 124.

JOHN R. BUCE *vs.* E. L. HENAGAN.

Discount cannot be offered in evidence under the general issue, or considered as payment; and the defendant cannot be permitted, without notice, to avail himself of a separate cause of action, which the plaintiff cannot be prepared to resist.

Before RICHARDSON, J., at Marlborough, Fall Term, 1840.

This was an action on merchants' account. Mr. Buce proved his own account by his books. He further stated that he had received, in 1834, or 1835, for the defendant, $55, and also $13 or $14, but he had credited those sums upon a note of McLeod's, to himself. He said, that in 1835, the defendant informed him he had demands on McLeod; but in 1837, the witness received a letter from McLeod, denying defendant's demands, of which he informed defendant. Defendant afterwards made no demand of the witness for the money. This evidence, brought out upon the cross-examination of the plaintiff, Buce, was objected to, because no discount had been pleaded; but I held it competent, under the general issue, to diminish the amount of the plaintiff's account, by so much money

received for the defendant. It might be considered as so *much paid, the plaintiff having transferred the money to the credit of [*29 McLeod's note to himself, in or after 1837.

I so charged the jury, and advised them to do justice between the parties, and allow the defendant credit for the money, unless he had sanctioned the credit on McLeod's note. That they might do this, notwithstanding the want of the notice of discount. The jury found for the plaintiff a small balance, having evidently allowed the defendant credit for the money received for him by the plaintiff; and the plaintiff appeals.

GROUNDS OF APPEAL.

1. Because his Honor admitted the defendant to offer in discount a claim against the plaintiff, of old standing, without having given the plaintiff any notice of discount previous to or at the trial, in which case, plaintiff could have proved that defendant's claim had been paid.

2. Because his Honor charged the jury that they might regard defendant's claim, which originated in the years 1834 and 1835, as a payment of the plaintiff's account, which was all contracted subsequent to December, 1838; whereas, there was no evidence of any demand made on plaintiff for said discount.

3. Because his Honor recommended the jury to do what they should consider justice between the parties, without regard to any distinction between discount and payment.

Curia, per EARLE, J. Payment seems necessarily to imply the assent of him who claims the benefit of it; and it is difficult to conceive of a payment which precedes, several years in point of time, the existence of the debt which it is alleged to extinguish, unless there be some proof of an agreement between the parties so to consider it. A counter demand is not payment. If the plaintiff had received the defendant's money after his cause of action arose, he would not have been authorized to apply it as a payment, without the assent of defendant. The money received by the plaintiff here, was paid him four or five years before his cause of action arose against the defendant; during that time he was liable for so much money had and received to the defendant's use, as a separate and independent cause of action. *If barred by the Statute of Limita- [*30 tions, before the account sued on was made, it cannot be supposed that there was any connection between them, as there is certainly no proof of any. If not barred, and the defendant had brought an action against the plaintiff, could the plaintiff have relied on his present demand as a payment? Certainly not. Discount and payment are not convertible terms. Discount may admit the existence of the plaintiff's demand; payment implies that it has been extinguished. If the plaintiff had applied the money received by him, as a payment of the demand sued on, it would have been at the option of the defendant to repudiate it or not. He might still have recovered it by action, and hence disputed the account. It is enough for the purpose of this motion, to say, that if the defendant's demand against the plaintiff was a proper subject of discount at all, it cannot, under the general issue, be considered as payment; and the defendant cannot be permitted, without notice, to avail himself of a separate cause of action, which the plaintiff cannot be prepared to resist.

The motion is granted: the whole court concurring.

Robbins and *McIver*, for the motion. *J. E. David*, contra.

Infra, 335. *An.*

*31] *DORINDA BEATY *vs.* JOHN HEARST.

Want of notice, is no ground to oppose the confirmation of the return of the Commissioners to a writ of Admeasurement of Dower. Where the return is perfect, and exactly in conformance with legal rules, and is verified by the oath of all the Commissioners, it is entitled to full credit, rather than the exparte affidavit of two of them.

Before EARLE, J., at Abbeville, Fall Term, 1839.

A writ of Admeasurement of Dower had been directed to five commissioners, to lay off the demandant's dower, or assess its value, in certain lands in Abbeville. To this writ the five commissioners, under their hands and seals, made return, that being first duly sworn, they went upon the land, and appraised its value, at the time of the alienation by the husband, at the sum of one thousand dollars, and assessed the sum of one hundred and sixty-six dollars and sixty-six and three-fourth cents, with interest from the 24th day of November, 1837, the day of the death of the husband, in lieu of dower.

On the coming in of the return, and motion made to confirm the same, it was resisted on the part of the defendant, on grounds set forth in an affidavit made by two of the commissioners, and an affidavit made by himself. The commissioners stated that, in fixing the value, they referred to the death of the husband, and that they did not ascertain how much was held by the defendant. In the affidavit made by himself, he stated that he had no notice of the valuation by the commissioners, with a view to assess the dower; and that the alienation was long previous to the death of the husband. On these affidavits the defendant moved to set aside the return, and to recommit the matter with instructions.

I considered that it would be of mischievous tendency to avoid the official act of the whole number of commissioners, under the sanction of an oath, upon the voluntary and exparte statement of two of them, or upon the affidavit of the defendant, that he had no notice, which did not seem to be indispensable, if the commissioners had other satisfactory information.

The motion of the demandant to confirm the return was allowed. The defendant moves to set aside the order.

*32] *The defendant appeals, and will move to reverse the decision made on the circuit, on the following ground:

Because the affidavits submitted by him, which remained wholly uncontroverted, after due notice to the plaintiff's attorney, showed that the commissioners had proceeded without notice to the defendant, without knowledge of the time of alienation, without ascertaining the quantity of land, and without reference to the value at the time of alienation.

Affidavits.—We, Samuel Cowan and Williams Truwit, two of the commissioners in this case, swear, that in valuing the land in question, we had no papers—we knew the quantity only by the representation of Mr. Palmer, plaintiff's father: how much the defendant held, we did not ascertain; and we referred to the death of James Beatty, the only date we were informed of, in fixing the value.

SAMUEL COWAN,
WILLIAM TRUWIT.

Sworn to before J. H. WILSON, J. Q., Oct. 16th, 1839.

I, John Hearst, the defendant, being duly sworn, say, that I had no notice of the valuation of the land by the Commissioners, with a view to assess the dower; that the alienation was long previous to the death of James Beatty, the husband of the demandant; and that the amount or value of the land, as assessed by the commissioners, far exceeds the amount given for the land at any time within the knowledge of this defendant.

JNO. HEARST, JR.

Sworn to this, the 17th October, 1839, before
THOS. C. PERRIN, Not. Pub.

Curia, per EARLE, J. The commissioners appointed to execute the writ, act under the authority of the Court, and the s nction of an oath. In this case, they all united in the execution of the power confided to them, and in the most formal manner have made their joint return, setting forth the mode in which they have performed their duty. They state, distinctly, the fact that they went upon the land, and appraised its value at the time of the alienation by the husband; and the question is, shall the Circuit Court refuse to confirm that return, on the affidavit of two only, out of the five commissioners, *that in valuing the land, they referred to the death of the husband, and not to the time of alienation; and the affidavit of the plaintiff, that he had no notice. It seems to be rather a question of practice or discretion, than of principle. There is no doubt that a Circuit Judge may withhold confirmation of such a return, either in dower, partition, or in any other proceeding, and allow further time, on such showing as satisfies him that there has been error or mistake, or any departure from established legal rules. To confirm or to withhold confirmation for a term,(a) becomes then a matter of discretion, to be exercised so as not to delay one whose right is clear, on the one hand, and not to sanction error and do injustice by precipitation, on the other. In this case, the return was perfect; the mode of proceeding was exactly conformable to legal rules; and was verified by the oath of all the commissioners. This, to say the least, is entitled to full credit, rather than the exparte affidavit of two of them. Had these last entered into any explanations of the mode and grounds of proceeding, so as to show that the commissioners were mistaken in point of fact or law; or, had a majority of them come forward, and presented the same ground, and suggested to have the subject recommitted, to correct errors; or, had the defendant, on the filing of the return, taken a rule to show cause, or given notice of his motion to the other commissioners, then, in the absence of any sufficient explanation, the confirmation of the return might properly have been witheld, or the return set aside, and the subject recommitted. But the single fact stated in the affidavit of the two commissioners, is in direct conflict with their return. They have, in fact, sworn both ways; and I do not perceive that such a case was made out as to require that the Circuit Judge should have set aside the return, or withheld the confirmation. And I think that this is the more obvious from the fact that the defendant, in his affidavit, does not swear that the valuation is too high, or that any injustice is done to him. In the opinion of a majority of the court, it was a question addressed rather to the [*33

(a) *Discretion of the Judge.* See 7 Rich. 535. 2 Rich. 78. *Post.* 159, 191, 339. 4 Rich. 466. 10 Rich. 141. 9 Rich. 133, 454. 8 Rich. 451. Harp. 400. 2 Sp. 167, 265. 5 Strob. 87. 3 Strob. 432. Rice, 298, &c., &c. *An.*

discretion of the Judge; and as the return was unexceptionable on its face, it was for him to be satisfied with the evidence *aliunde* to impugn it. And although they might have come to a different conclusion, and decided differently they do not feel at liberty to interfere with his judg-
*34] ment. We are all *agreed that the want of notice was no ground to oppose the confirmation of the return. The summons and the writ described the land on which dower was to be admeasured or assessed, and the verdict had found that the defendant was in possession. Nothing more was needed.

Motion refused: the whole court concurring.

Wardlaw and *Perrin*, for the motion. *Burt* and *Thompson*, contra.

ALEXANDER MCCARLEY, Executor, *vs.* W. G. DAVIS, J. S. OSBORNE, and WM. VANCE.

A Prison Bounds' Bond becomes forfeited, against all the parties to it when the principal forfeits his rights to the benefits of the law under which it was taken; and the liability of the securities is fixed, as soon as the plaintiff acquires his right to the bond by assignment.

The amount of recovery is the amount of the debt on which the defendant was confined.

Before BUTLER, J., at Laurens, Fall Term, 1840.

This was an action of debt on prison bounds' bond. The common breaches were assigned, and the defendants, Osborne and Vance pleaded to the declaration—first, a special plea to this effect, that after the execution of the bond, and before its assignment to plaintiff, Davis, the principal to the bond, had been remanded to jail by the plaintiff, which was a discharge of his securities. To this plea, there was a general demurrer, which I sustained, holding that the plaintiff had no control over Davis, until after the finding of a jury, that his schedule was fraudulent, or that he had gone beyond the bounds; and that after such finding, Davis was properly committed, and that his sureties could not be discharged
*35] thereby. The second *plea was performance, upon which plaintiff took issue. Bond and assignment admitted, the first dated 7th February, 1839, and the other 29th June, 1839. The plaintiff then offered the following evidence: Verdicit of special jury on a suggestion of fraud, tried before the Commissioner of Special Bail, under the Act of the Legislature of 1833—"We find the schedule is fraudulent, on the ground that Davis has not included in his schedule his interest in Mississippi, in the concern of Davis & Hill" From this verdict there was an appeal, which was confirmed by the Court of Appeals. The last piece of evidence introduced by plaintiff, was the *ca. sa.* under which Davis had been confined, and the amount of the recovery endorsed thereon, to wit: $953 34, with interest from the 1st of November, 1838.

The defendants contended that the verdict against Davis was not conclusive against them, and they offered to go into evidence to show, 1st, that Davis had included in his schedule all his property, and to show that he had inserted in it all his interest in the Mississippi concern. 2d. That if any thing was omitted, to show the value of it, with a view of

reducing the damages. 3rd. To show that some of the jury who tried the question of fraud before the special jury, would swear that they did not notice or take into their consideration that part of Davis' assignment which refers to or concerns the Mississippi partnership.

I refused to receive any of the evidence that was offered, holding that defendant's liability was conclusively fixed by the finding of the jury—that as soon as it was ascertained that Davis had forfeited his right to the prison bounds, or to be discharged, all the parties to his bond became bound for the amount of the recovery against him ; and that that amount could not be reduced, by showing the amount of the property omitted from the schedule.

The plaintiff accordingly took his verdict for the amount of the judgment against him, upon which the *ca. sa.* had issued—which was the sum of $953 34, with interest, &c.

From this decision the defendants appeal, on the annexed grounds :

*1. Because the finding of the special jury on the schedule of Davis, was not conclusive against the defendants, his sureties to the bond. [*36

2. Because it was competent for the defendant to show the value of the property omitted in the schedule, with a view of reducing the recovery.

Curia per BUTLER, J. The grounds taken in the appeal resolve themselves into this proposition—have the securities on a prison bounds' bond the right to question the finding of the jury against their principal, establishing the fact that he had forfeited his right to the jail rules or bounds, under the prison bounds' Act, by rendering a false and fraudulent schedule ? Or, in other words, whether the bond becomes forfeited against all the parties to it, when the principal forfeits his rights to the benefit of the law under which it was taken. The securities undertake, by the bond, that their principal will remain within the prison bounds, and that he will, within forty days, render in to the Clerk of the Court a true and honest schedule of his effects ; otherwise that they will pay the debt on which the principal has been confined.(*a*)

By the 7th clause of the Act it is provided, "that any prisoner committed on execution aforesaid, who shall not give in such schedule, (that is, a true schedule,) agreeably to the tenor of his or her bond, shall not be any longer entitled to the prison rules, but his bond shall be forfeited and assigned to the plaintiff," &c. And in the latter part of the same clause, it is provided how the forfeiture shall be ascertained, to wit : by a jury, &c. When, therefore, the securities signed the bond, they were not only well aware of the nature and extent of their obligation, but of the manner in which their liability was to be fixed, to wit : by a decision against their principal. This decision must form a part of the contract ; for, upon such decision, the plaintiff acquires his right to the bond, by an assignment from the Sheriff ; the very object of such assignment being to enable the plaintiff to recover against all the parties. The plaintiff's right to the bond, and the defendant's liability to pay it, would seem to be co-extensive ; and that one is established as soon as the other is lawfully acquired. According to these views, the liability of the defendants was conclusively fixed by the finding of the jury against Davis. The right of recovery being established, the extent of it followed

(*a*) 5 Stat. 78. *An.*

*37] *which was the amount of the debt on which Davis had been confined. The opinion of the Court, therefore, is that the decision below was, in every respect, correct and it is affirmed.

The motion of defendants is therefore dismissed.

RICHARDSON, O'NEALL, EVANS, EARLE, JJ., concurred: GANTT, J., absent.

Young and *Irby*, for the motion. *Sullivan*, contra.

See *Harley* v. *Nelson*, 2 Strob. 169. 10 Rich. 80. *An.*

JOSEPH PEARSON *vs.* JAMES B. DAVIS.

In case of eviction, by title paramount, the measure of damages is the price paid for the land, with interest.

Consequential damages cannot be recovered for any inconvenience or loss which the vendee may sustain in his improvements, however expensive or permanent. (*The case of Henniny, Executor*, v. *Withers*, (3 *Brev. Rep.* 458,) *considered and confirmed.*)

Before EARLE, J., at Fairfield, Fall Term, 1840.

Assumpsit on a note of hand, given for the purchase money of a tract of land, conveyed by the plaintiff to the defendant.

The defendant, by suit at law, had been evicted, by title paramount, of twelve acres, lying about the middle of the tract, and running in a narrow slip, nearly through it; the defendant, by way of discount claimed an abatement, not only for the actual value of the land thus recovered from him, in proportion to the price given for the whole, but additional damages for the injury and inconvenience which the person in possession must suffer.

I overruled this latter claim, and instructed the jury to allow an abatement *pro tanto*, for the actual value of the land, who found accordingly.

*38] *GROUNDS OF APPEAL.

1. That the presiding Judge erred in charging the jury, that they could not allow the defendant any discount beyond the value of the deficient land.

2. Because the verdict was contrary to law and evidence.

Curia, per EARLE, J. The Act of 1824,(*a*) provides that in cases, "the true measure of damages shall be the amount of purchase money, at the time of alienation, with legal interest." Such has been the settled rule at law, since the case *Furman* vs. *Elmore.*(*b*) The defendant, under his discount, has under that rule, been allowed damages, proportioned to the actual value of the land recovered from him. Independently of the Act, and the previous settled rule, it would be difficult to sustain, on any principle, or by any argument, the proposition, that damages could be recovered for the inconvenience complained of, as resulting from the loss, in addition to the value of the land. The standard of damages should not only be uniform, but such as to enable it to be applied to every case of eviction, by title paramount. There

(*a*) 4 Stat. 238. *An.* (*b*) 2 N. & McC. 189. *An.*

See 1 Bay. 18, 92, 265. 3 Bus. 2 Tread. 584. 1 McC. 384, 466. 2 McC. 413. Chir. 128. *An.*

is no reason why the rule for assessing damages, where the land recovered lies in one part of the tract conveyed, should be different from what it would be if the land lay in another place. Indeed, it is a conclusive answer to the proposition, to say, that there can be no standard, or rule, for assessing damages, for the inconvenience here complained of. They are altogether speculative and uncertain. If it should suit the interest of the vendee to sell the remainder of the tract in two parcels, then there is no damage at all. If he cultivates on one side only, the inconvenience is trifling; if on both sides, it is greater. If a person were to purchase a tract of land adjoining one whereon he resided, and should be evicted from a portion of his purchase, nearest his residence, he too might claim additional consequential damages, to a greater amount than if the loss accrued on the side of the tract most remote; and in every case, the assessment would depend on the accidental circumstances of residence and cultivation. It is well settled, that a vendee cannot recover for actual improvements, however expensive or permanent; and for a much stronger reason, he should not be allowed to recover for a mere inconvenience, arising from a change in the shape of his tract, or the *relative position of his fields. This question was settled in [*39
the case of *Henning* vs. *Withers*, (3 Brev. Rep. 458) which was very well considered. The defendant purchased a tract of land, with a stream of water running through it, on which, but lower down, and without the boundaries of the tract, he built a saw mill. He was evicted by title paramount, of a narrow strip of the land, on the side nearest the mill, and extending across the stream; in consequence of which, he was obliged to lessen the height of his dam, and of course the quantity of water in his pond; whereby the profits of his saw mill were greatly diminished. Being sued on the bond for the purchase money, he claimed by way of discount, not only an abatement for the actual value of land, but for the consequential damage, resulting from the loss, in its effect upon the profits of the mill. But it was held, the whole Court concurring, that he was entitled only to an abatement for the value of the land.

The motion is refused: the whole court concurring.

Woodward, for the motion. *Fair*, contra,

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*The State *vs.* W. H. Belcher. [*40

Books were sent up from Charleston to Columbia, and consigned to Polock, Solomon & Co., merchants and auctioneers in Columbia, by whom the freight from Charleston was paid, and sold by them, and the defendant, at auction and at private sale, for the use and benefit of the defendant: *Held*, not to come within the purview of the Act of Assembly for hawking and pedling.

A hawker and pedlar is one who travels from town to town, or from plantation to plantation, carrying to sell, or exposing to sale, goods, wares, and merchandize; but a single shipment of goods, regularly consigned to Polock, Solomon & Co., by the defendant, and sold by himself or them, for his use and benefit, is not hawking and pedling within the meaning of the Act.

The defendant a non-resident of this State, did sell goods, wares, and merchandize in a house in the town of Columbia, and is therefore, when properly indicted and convicted, liable to the penalties of the Act of Assembly of 1835—page 6. (*Per* O'Neall, J.

Before EVANS, J., at Richland, Fall Term, 1840.

The defendant was indicted, under the Act of Assembly, for hawking and pedling in books. The evidence in substance was that the defendant was a transient person. The books were sent up from Charleston, consigned to Polock, Solomon & Co., merchants and auctioneers in Columbia, by whom the freight from Charleston was paid. A short time before the 28th November, 1838, the defendant came to Columbia, and arrangements were made for the sale of the books at night, by auction, and in the day by private sale. A room was hired for the purpose. Hand bills were printed, giving notice of the auction by Polock & Solomon. The sales were opened by Polock, but he gave place as crier to the defendant, who was very expert as an auctioneer. The account of sales was kept by a clerk of Polock & Solomon. In the day time, the defendant sold books at private sale, but one of Polock & Solomon's clerks usually attended in the store. The sales continued three days and nights. The books unsold were subsequently packed up and sent to Charleston. Those that were remaining on hand, if any, on the first of January, were returned to the tax collector as part of the stock in trade of Polock, Solomon & Co. The money for the books sold, was sometimes to them and sometimes to the defendant. These facts were proved by Polock and Levy, two of the partners; they also
*41] produced their books, *showing an aggregate of sales at auction, of $3,572, and $350, at private sale. From these amounts was deducted, the freight, house rent, 5 per cent. commissions on the sales at auction, and 1 per cent. on the private sales. And for the balance they said they had accounted to the defendant.

It was proved by Cunningham that he purchased books and stationery to an amount exceeding $100, part at auction and part at private sale, and produced the receipted bill signed by Belcher, to whom he paid the money. He also said Belcher told him he had sold to the amount of $5000, nearly half of which was at private sale.

I defined a hawker and pedlar to be an itinerant trader who carries goods, &c., through the streets, from town to town, and from place to place. It was the itinerancy of his employment which gave character to it, and not the mode in which he carried his goods, or the place where his wares were exposed to sale. I charged the jury as follows, viz: 1. That it was a usual and common course of business to consign goods to an auctioneer or agent, to be sold for and on account of the owner. Such sales, if *bona fide*, were the sales of the agent; and it could and did make no difference whether the owner was present assisting at the sales or not. If, therefore, the account of these sales, as given by the auctioneers, was the true one, then I thought the defendant ought to be acquitted. 2d. But if the employment of Polock, Solomon & Co., was merely pretensive, and Belcher was the vendor of the goods under color of their name; or if, over and above the amount sold by them, he effected other sales himself, independent of their agency, then the jury might convict him.

The defendant was convicted.

GROUNDS OF APPEAL.

1. Because there was no evidence to sustain the charge laid in the indictment.

2. There was no proof that defendant was a hawker and pedlar within the meaning of the Act of 1835, increasing the price of license, under which he was indicted.

3. There was uncontroverted evidence that the goods were regularly consigned to Polock, Solomon & Co.; that they made the sales, and received their usual commissions of* 5 per cent. on auction sales and 1 per cent [*42 on private sales.

4. The jury probably misapprehended the extent of the charge by the Court, that if defendant employed Polock, Solomon & Co. with a view to invade the law against hawkers and pedlars, he would be liable.

5. Because the Court charged that if Belcher sold more goods than he paid commissions for to Polock, he would be liable under the Act.

Curia, per O'NEALL, J. This case, it seems to me, turns upon the question, whether the defendant is, or is not, a hawker and pedlar, within the Acts of this State? This question will be answered by ascertaining, first, from our Acts, who is a hawker and pedlar; and secondly, whether, from the facts proved, that character is fixed upon the defendant?

To answer the first question, we are obliged to go back to the old Act of 1737, P. L., 152. Its preamble and enactment both point to "persons who travel from town to town, from one plantation to another, by land or by water, carrying to sell or exposing to sale, any rum, sugar, or other goods, wares or merchandizes," as those designated by the general terms, "Hawkers and Pedlars." All the subsequent Acts, (Act of 1797, 2 Faust, 151; Acts of 1825, p. 60; Acts of 1831, p. 40; Acts of 1835, p. 45,) speak of "Hawkers and pedlars," as known legal terms, and do not extend their meaning. Taking then the true meaning to be that pointed out by the Act of 1737, it is impossible that the defendant, in any point of view, can be regarded as a "Hawker and Pedlar." He is not one who travels from town to town, or from one plantation to another, carrying to sell, or exposing to sale, goods, wares and merchandizes. This is a single shipment of goods regularly consigned to Polock, Solomon & Co., and by them, or by himself, sold at auction or private sale, for his use. This is any thing else than hawking and pedling. It is just such a sale of goods as is constantly effected in every city in the union; and, I presume, that it never entered into the head of any one that such a sale was an act of hawking and pedling. In construing a highly penal statute, we should be bound to give it such a construction as would prevent persons not clearly embraced by its words from being held amenable to its provisions. If the statute did not define hawkers and pedlars, *we should then have to ascertain what was the usual [*43 popular meaning of those words. That would give the definition given by the Judge below, and which is in substance the same by the Act. Taking it, and defining a hawker and pedlar to be "an itinerant trader who carries goods, &c., through the streets, from town to town, and from place to place," no one, it seems to me, could suppose that any thing short of a sale of goods by the retail in this itinerant way, would constitute one a hawker and pedlar. It is, however, unnecessary to pursue this reasoning any further, as the 11th section of the Act to raise supplies for the year 1835, (Acts of '35 p. 6,) (*c*) most plainly pro-

(*a*) 3 Stat. 487. *An.* (*b*) 5 Stat. 308. 6 Stat. 265. Id. 433. Id. 529. *An.*
(*c*) 6 Stat. 543. *An.*

vides for the case of the defendant, and he cannot, therefore, be held liable to the greater penalties of the Acts against hawking and pedling. It provides, "If any transient person or persons, not resident in this State, shall at any time sell, or expose for sale, any goods, wares, or merchandize whatever, in any house, stall or public place, after the first day of January, in each year, such person shall make return, on oath, within ten days after commencing to sell as aforesaid, of the whole amount of the stock in trade he may have possessed at that time, to the tax collector of the district or parish in which the said goods, wares, or merchandize shall have been or may be sold or exposed to sale. And if any person shall neglect or refuse to make such return as aforesaid, within the time prescribed above, he shall, on conviction thereof by indictment forfeit and pay the sum of not more than $1000; unless such person shall have paid for and procured a license according to the provisions of an Act entitled "An Act to increase the price of license to hawkers and pedlars" The defendant, a person not resident in this State, did, within the words of this Act, sell goods, wares and merchandize in a house in the town of Columbia, and is therefore, when properly indicted and convicted, liable to its penalty. The exception with which the section closes in favor of hawkers and pedlars, does not make all persons not resident in this State, and selling or exposing for sale, any goods, wares, or merchandize, in any house stall, or public place, necessarily hawkers and pedlars. It was intended to save such hawkers and pedlars who had taken out the license, and might sell or expose to sale in a house, stall or public place, their merchandize, from being liable to this general provision.

*44] *The motion for a new trial is granted.

Richardson, Earle, Butler, JJ., concurred: Evans, J., absent, but concurs: Gantt, J., absent.

W. F De Saussure, for the motion. *Mr. Solicitor Edwards*, contra.

The State *vs.* David Mobley.

All roads laid out by *public authority* must be regarded as public roads, in the obstruction of which a nuisance may be committed.

A road laid out by order of the County Court of Chester district is a public road, unless discontinued by order of the commissioner of roads, or become extinct from long neglect or non user.

Before O'Neall, J., at Chester, Fall Term, 1839.

The defendant was indicted for obstructing a road leading from the plantation of Wm. L. Wallis, on the York road, to the mill of Charles Walker, deceased, in Chester district. The proof very clearly established an obstruction of the road by the defendant.

The County Court of Chester, on the 31st of July, 1798, ordered the road to be laid out by the following order: "On petition, ordered, that *a travelling road* be laid out and cleared from Thomas Wallace's to Robert Owen's grist mill, to be laid out at the direction of Thomas

Wallace and William Monahan, the nearest and best way, so as not to interfere with the enclosure of any person whatsoever, and to be cleared and kept in repair by the persons who live contignous thereto, and have the benefit thereof; also, a rad from the mill to intersect the Charleston road near the lower corner of Thos. Cabeen's field, and thence into Fishdam road above William Murray's on the same conditions and premises as the above, at the direction of James Vants."

*Under this order, the road was opened and laid out. It has been an open road since '98: some persons voluntary worked on it; [*45 the commissioners never kept it in repair. It was still, however, used by the neighborhood. It was changed by many persons through whose land it ran, as suited their convenience. Owen's mill was ten or twelve years out of repair; it was then repaired by Charles Walker, who had bought it.

I submitted to the jury the inquiry—is this a public road? I said to the jury that that which is for private use cannot be regarded as public. A road to a church or a mill, and there terminating, would not, in general, be a public road. On this part of the subject, I said to them, there was a great difference between our condition and that in England, whence our common law was derived. That I thought it possible *here* that a road to a mill might be a public one; as when it was used by the people at large, and where it led from a public road to the mill and thence into another public road, and became a public thoroughfare. I did not say to the jury, as the defendant's ground of appeal suppose, "that the English common law, in relation to roads, was not applicable to roads in this State."

I said further to the jury, that a road from village to village, or from one public road to another, might or might not be, a public one. A road kept in repair by the commissioners of roads, is a public road It might, however, be that a road not kept in repair by the commissioners, was a public road. As where a road is laid out by public authority for the use of the people. If such a road be discontinued by the commissioners, then it may end its public character. So, too, where they do no act disclaiming the road, yet it might be disused for such a length of time as would satisfy them that it had ceased to be public.

Frequent changes of a road, unless they amount to an abandonment, could not affect its public character.

With these instructions, the case went to the jury, who found the defendant guilty; he appeals on the annexed grounds.

GROUNDS OF APPEAL.

1st. Because his Honor, the presiding Judge, erred in charging the jury: 1. That the common law of England, in *relation to roads, was not applicable to roads in this State. 2. That the road in this case had been [*46 established as a public road. That a civil action could not be maintained for obstructing a road such as this. 4. That this road had not been abandoned.

2. Because the verdict of the jury was contrary to the evidence that this had never been established as a public road; that it had not been opened by the public; that it never had been repaired or worked on by the inhabitants; that it never had been regarded by the commissioners of roads, or by the inhabitants of the neighborhood, as a public road; that it had been obstructed by several persons, in various places, for twenty years; that during a period of

ten or twelve years, the mill to which it led had been destroyed and the road abandoned; that the road had not been entirely obstructed, but only turned; that the defendant was indicted for obstructing a public road, and that this road led only to a grist mill; as well as the law in relation thereto.

ORDER OF THE COUNTY COURT.

At a Court held and continued by adjournment for Chester county, at the court house of said county, on the 31st day of July, in the year of our Lord one thousand seven hundred and ninety-eight, and of the independence of the United States of North America the twenty-third, present Joseph Brown and William Gaston, Esquires, two of the Judges of the Court.

On petition, ordered, that a travelling road be laid out and cleared from Thomas Wallace's to Robert Owens' grist mill, and to be laid out at the direction of Thomas Wallace and William Monahen, the nearest and best way, so as not to interfere with the inclosure of any person whatsoever, and to be cleared and kept in repair by the persons who live contiguous thereto, and have the benefit thereof; also, a road from the mill to intersect the Charleston road near the lower corner of Thomas Cabeen's field, and thence into the Fishdam road above William Murray's, on the same conditions and premises as the above, at the direction of James Vants.

Ordered, that a public road be laid out and made, the nearest and best way, taking off the Charleston road where the old road formerly took off, below Stinson's old field, to strike the Fairfield county line at the same place, at
*47] where the *Mountain Gap road intersects the said Fairfield county line, at the direction of John McDaniels; and that all persons living two miles of said road, within the limits of said county, be called on to clear and keep the same in repair.

Curia, per O'NEALL, J. In this case my opinion expressed on the circuit has undergone no change. The facts have been found by the jury, that in its origin, this road was laid out as a public road; that it has been used as such ever since; and that there has been no such change of it as would affect its allowance.

It only then remains to inquire whether, in law, it can be regarded as a public road?

I think there is some confusion, in cases of this kind, by the manner in which highways are defined in the books. The distinction between public roads, (consisting of highways and private roads or paths,) and private ways, have not been observed.(*a*) Judge Brevard, (3 Brev. 85,) in the case of *exparte Withers*, has, I think, properly classed and distinguished public roads. He says "public roads are best distinguished into two sorts, namely, highways and private roads or paths. A highway is a principal road leading to a market town, or some place of general resort, and is commonly travelled by all kinds of people. Private roads are neighborhood ways, not commonly used by other than the people of the neighborhood where they are, although they may be used by any one who may have occasion to do so." A private way, on the other hand, is a way arising by grant for the use of one or more individuals. The road law of 1721, (P. L. iii. sec. 19,)(*b*) provides that "all and every the respective commissioners above mentioned, within their parishes or divisions, or the majority of them, shall, with all convenient speed after the ratification of this Act, at the equal charge and

(*a*) Act of 1741. 9 Stat. 127. 2 N. & McC. 527. 4 McC. 68. 3 McC. 170. *Am.*
(*b*) 9 Stat. 54, § 19. *Am.*

labor of all and every the male inhabitants residing within the respective divisions aforesaid, from the age of sixteen to sixty years, make, mend, alter and keep in repair, all and every the high roads, not exceeding forty feet wide, *private paths*, bridges, causeways, creeks, passages and water courses, *laid out* and *to be laid out* in the aforesaid several precints and parishes " This Act, it will be observed, is in exact conformity to Judge Brevard's classification of public roads. By public authority, two kinds *of roads then existed, and were afterwards to exist, in South Carolina, "high roads" and private paths." What was [*48 meant by "private paths," has been, I think, further elucidated by Judge Brevard, in the case *exparte Withers*, (3 Brev. 86.) He says, "by the words "private paths," "it seems clear that the Legislature meant roads free and common to all who might choose to make use of them ; that is to say, public ways diverging from and running across the main or principal roads or highways, commonly called "great roads," and not private paths exclusively appropriated for private purposes." This definition embraces, I think, very clearly, the road in question. But this can be made more apparent by a further reference to our legislation on this subject. By the Act of 1785, sec. 55. (P. L. 385,)(*a*) the Judges of the county court were clothed with all the power and authority of the commissioners of the roads in relation to roads. The Act of 1788, (P. L. 443–4,)(*b*) provided for the appointment of commissioners of the roads ; and by the 6th section, provides that they shall be authorized and required to lay out, make and keep in repair all such "high roads, private paths," &c., as they shall judge necessary. The 17th section of the same Act, (P. L. 447,) provides that the Judges of the county court shall be vested with the same powers respecting the high roads and bridges with which the commissioners were by this Act clothed. Under this authority they laid out the road in dispute, and its origin there can be therefore no question that it was a public road, distinguished from a high road as a private path. Independent of the public character of the road, ascertained from its public origin, the terms made use of in the order "a travelling road," make it as open to public use as if the words had been in the succeeding order—"a public road," used by the Judges, ordering another road to be laid out. But neither the commissioners of roads nor the judges of the county court ever had the power to lay out a mere private way. This is conclusively shown by *exparte Withers*, (3 Brev. 83.) The power of laying out a mere private way, never having been conferred, as I have no doubt it never could have been constitutionally exercised or conferred, by the Legislature, it follows, that all roads laid out by public authority, must be regarded as public roads, in the obstruction of which a nuisance may be committed. It is, however, supposed, unless the public are liable to keep the *road in repair, [*49 that it cannot be regarded as a public road. But this I do not admit. There are many roads which are essentially public, where there is perhaps no liability to keep them in repair. An instance of this kind will be found in the case of *Rowland* vs. *Wolf*, (1 Bail.) On the present occasion, I am, however, far from believing that the commissioners of high roads, for Chester are not liable to keep this road in

(*a*) 7 Stat. 237. *An.* (*b*) 9 Stat. 309. *An.*

repair. For the order directing the roads to be laid out, directs "that it shall be cleared and kept in repair by the persons who live contiguous thereto and have the benefit thereof." This is in exact conformity to the powers conferred on the county court judges and the commissioners of roads by the Acts of '85 and '88. A road laid out and directed by the county court judges in '98, to be kept in repair, was in pursuance of the power delegated to them by the Legislature, and is in law the same as if the Legislature, by Act, had done the same thing. Looking at it as a road established by the Legislature, and by Act directed to be kept in repair, there could be no doubt of the liability of the commissioners to keep it in repair, no matter how long they might have neglected it. This last observation however, must be always taken with the qualification, that the road had not lost its public character by non user. On the present occasion, the jury have found that the road had not been so long disused as to destroy it.

These views, it seems to me, end all controversy about the character of the road, which might otherwise arise from its terminus. The cases in which that would have effect are where the way is to be referred to prescription merely.

The motion is dismissed: the whole court concurring.

Gregg and *McAlilly*, for the motion. *Player*, *Solicitor*, contra.

[a] See *Infra*, 329. *State* v. *Pettus*, 7 Rich. 393. *State* v. *Sartor*, 2 Strob. 60. *Nash* v. *Peden*, 1 Sp. 21. *Heyward* v. *Chisholm*, 11 Rich. 262. 6 Rich. 399. 5 Rich. 186. *An.*

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*50] *David Ewart *vs.* M. G. Nagel and A. G. Nagel.

A feme covert cannot be made a feme sole carrier under the custom, or under the Acts of the Legislature of 1823 and 1824.

The privilege of a feme sole trader does not reach beyond buying and selling merchandize. *S. P.* 1 *Hill*, 429.

Before O'Neall, J., at Columbia, Spring Term, 1840.

This was an action against defendant, M. G. Nagel the wife of A. G. Nagel, (who was joined for conformity sake,) as a feme sole trader, to charge her with a loss of cotton shipped on a boat alleged to belong to her, called the Swan.

The proof was that her husband, A. G. Nagel, received the cotton and signed the receipt as agent for M. G. Nagel. He generally acted in all matters about the boat. Mrs. Nagel had a store in Columbia, or rather one was carried on in her name. Her husband acted as her agent in every thing about it.

He was insolvent and had no property: the property in his possession was considered and sold as the property of his wife. She was considered as the owner of the boat; but there was no proof on that matter further than mere reputation: for the possession in fact was by Major Nagel, her husband. She was also regarded as a free dealer.

The loss of the cotton was proved, and the only question was whether

Mrs. Nagel, a *feme covert*, could be made liable as a common carrier. I thought, and so instructed the jury, that there could not be such a thing as a feme sole trader in boating. That the character, with its privileges and liabilities, only existed in the mercantile business carried on by the wife separate and apart from the husband. His interference with the business would prevent the wife from being regarded as a feme sole trader. That the act of the Legislature had not extended the common law in this respect: it had added to the common law requisitions, the publication of a month's notice of the intention to carry on a separate business, and to become a feme sole trader.

That the only ground on which the defendant could be liable was, that the boat was her separate estate; and that hence earning for her freight, she would on that account be liable. The jury were told to enquire as to that fact, and if *they were satisfied of its truth, to find for the plaintiff, otherwise for the defendants. [*51

The jury found for the defendants. The plaintiff moves the Court of Appeals for a new trial, on the annexed ground.

GROUNDS OF APPEAL.

Because the evidence having been full, clear and uncontradicted, that the defendant, M. G. Nagel, was a free dealer and sole trader in the business of merchandise, and of boating connected therewith; that the store and boat belonged to her as a free dealer and sole trader, and were thereby protected from the creditors of the defendant, A. G. Nagle, who was notoriously and utterly insolvent, and who acted as her clerk and agent in the store and about the boat; that as such free dealer and sole trader, she received the cotton of the plaintiff of the value of $1390 62 on board her said boat, to be carried to Charleston for certain freight, to be paid to her as such free dealer and sole trader; and that the said cotton was never re-delivered to the plaintiff or his factors, whereby he suffered a loss of $1,390 62; the verdict of the jury was not only contrary to the said evidence, but without any evidence whatever, and was contrary to the law in relation to the subject matter of said evidence.

Curia, per O'NEALL, J. This Court is satisfied with the instruction given by the presiding Judge, that "there cannot be such a thing as a feme sole trader in boating:" The other instruction that she might be liable in respect of the boat being her separate estate, is more doubtful: but as that was in favor of the plaintiff, and as the jury have found against the fact which was the predicate of that instruction, and as we think their verdict, in that behalf, ought not to be disturbed, it is unnecessary now to give a definite opinion on that point.

I will, in as few words as possible, assign the reasons why we think there cannot be a feme sole trader in boating. The utmost latitude to which this extraordinary privilege can be extended, would be to allow it to attach to other business besides merchandise, which females can and usually do carry on without the aid of their husbands. Generally speaking, the custom ought to be strictly construed; and there is little *reason why we should give it a wider extension here than it had in London. [*52

The Act of 1744, sec. 10, (P. L 190,)(*a*) recognized the existence of feme sole traders, and fully justified the Court in applying the custom, as

(*a*) 3 Stat. 420. See also Act of 1712. 2 Stat. 593. *An.*

was done in 1798, by the constitutional court, to the case of *Newbiggin* vs. *Pillans and wife*, (2 Bay, 164.) That case arose out of buying and selling merchandize. The Court, in that case, expressly recognize the custom, as stated in Mr. Turnbull's argument, to be that "where a feme trades by herself in one trade with which her husband doth not intermeddle, *and buys and sells in that trade*, then the feme shall be sued, and the husband named only for conformity and if judgment be given against him, execution shall be only against the feme." So in *Surtell* ads. *Brailsford*, (2 Bay, 333,) the Judges maintained the same doctrine, when they said that "the defendant kept a shop and carried on business in her own name, apart from her husband, (if she ever had one) and in which he never intermeddled for the space of ten or twelve years, which constituted her a sole dealer at common law." These two cases constituted the guide to the profession of the law: and it was, I think, the generally received opinion, that a feme covert could not acquire the character of a sole trader in any other way than by making out the proof of the facts required by the custom, until the cases of *McGrath* vs. *Robison*, (1 Eq. Rep. 445,) and *Miller* vs. *Tollison*, (Harp. Eq. Rep. 145.) The first of these cases has been, by Judge Johnson, in the case of *McDaniel* vs. *Cornwell*, shown to be not inconsistent with the customs. The case of *Miller* vs. *Tollison* extended the custom to the business of tavern keeping, and it may be sustained on the ground that it is a business that females may and do carry on without the aid of their husbands; but I confess that I should be little disposed to take that view, unless constrained so to do by the case to which I have referred.(*a*) The Acts of 1823 and 1824, (pages 35 and 23)(*b*) have been the fruitful source of many errors in this behalf. It was supposed that they had introduced a new mode of constituting feme coverts sole traders, when, in point of fact, they only recognized the custom, and imposed additional restrictions on its allowance. The case of *McDaniel & Cornwell*, (1 Hill 29,)
*53] corrected these errors By *it, it was held that the privilege of a feme sole trader arose out of the business of buying and selling merchandize, carried on by a feme covert without any intermeddling therewith by the husband, after a compliance, on her part, with the requisitions of the Acts of '23 and '24.

This brief review of the law of this State fully sustains the position that a feme covert could not be made a feme sole carrier, under the custom, or under the Acts of the Legislature. If we were, however, free to reason about it, as an original proposition, we must come to the same conclusion. It is utterly inconsistent with the duties of the wife to the husband and to her children, that she should engage in a business which would deprive them of her society and assistance, which would send her out into the busy world to mingle with all classes, and lose that distinctive modesty of character which makes her at home and abroad the ornament and the directress of society. But it is argued that the business of a common carrier is such as would make the person engaged in it a trader within the meaning of the English statutes of bankruptcy. This may be so, and still it will not help the plaintiff. For the term

(*a*) 6 Stat. 212. Id. 236 § 2. *An.*
(*b*) See *Dial* v. *Kneuffer*, 3 Rich. 78. *An.*

trader, when applied to a feme covert, is used in a restricted sense. Its meaning is pointed out by the custom of London, which has been allowed in this State. According to that, it does not reach beyond buying and selling merchandize.

The motion is dismissed: RICHARDSON, EARLE, BUTLER, JJ., concurred: EVANS and GANTT, JJ. absent.

Gregg, for the motion. *De Saussure* and *Black*, contra.

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*MRS. P. MYERS *vs.* WM. J. LEWIS. [*54

The Act of 1799, requiring the plaintiff in any writ of attachment to enter into bond, before the clerk of the Court of the district in which such writ of attachment is issued, to the defendant, in double the amount of debt or demand for which the attachment is issued, requires that the bond given shall be only executed by the plaintiff, or his attorney in fact, and acting in his room and stead. No other person is authorized to execute such bond.

Before EVANS, J., at Richland, Fall Term, 1840.

This was a motion made to quash a writ of attachment which had been issued by the plaintiff against the defendant, and the bond executed by her son, William M. Myers, Esq. His Honor overruled the motion, upon the ground that it was sufficient that the bond required by the Act had been given by the plaintiff's son; from this decision the defendant appealed to the Court of Appeals, and renewed the motion to quash the writ.

Curia, per O'NEALL, J. The 7th section of the Act of 1799, entitled "An Act supplementary to an Act entitled an Act to establish an uniform and more convenient system of judicature," (2 Faust, 315,) enacted that it "shall not be necessary to petition, as heretofore, any of the judges of the State for any writ of attachment."(*a*) Accompanying this enactment is a proviso in the following words: "Provided, always, that no writ of attachment shall issue before *the plaintiff* has given bond to the defendant, in double the amount for which the attachment issues, to be taken by and lodged with the clerk of the district, to be answerable for all damages which the defendant may sustain by any illegal conduct in obtaining said attachment." The words of this proviso are so plain that we are compelled to enforce them. None but the plaintiff, or his attorney in fact, acting in his name and stead, can execute the bond. We have no right to do more than to say "*ita lex scripta*." If we were, however, at liberty to reason about it, we should arrive at the same conclusion. The plaintiff suing can just as easily constitute an attorney in fact to execute the bond, as he can appoint an attorney at law to sue. The defendant, too, is *entitled to the security of the [*55
party professing to be his creditor, to be answerable for all damages for any illegal conduct attending the suing out his attachment. If this

(*a*) 7 Stat. 294. See Act of 1839. 11 stat. 76 § 21. *An.*

were not so, persons absent from the State, and having property in it, might be harassed by attachments on unfounded claims, and the persons setting them on foot might shelter themselves behind the bond of irresponsible persons. So, too, it is for the plaintiff's interest that he, in person or by attorney, should execute the bond. He might not be willing to incur the responsibilities of an attachment, if informed that that was his mode of redress. It is the right and the duty of a party in Court, to be informed correctly of the consequences likely to result from the proceeding set on foot in his name. The attachment Act operating in *rem*, and divesting the alleged debtor of his power of controlling his own property before the debt is ascertained by the judgment of a Court, ought to be strictly construed. And hence, therefore, we should not be at liberty to seek for an interpretation beyond the plain meaning of the words.

The bond in this case was not given by the plaintiff, or in her name. It was the bond of her son, William M. Myers. This was no compliance with the Act, and hence the writ was improperly issued.

The motion to reverse the decision of the Judge below, and to quash the writ of attachment is granted.

GANTT, EARLE, BUTLER, JJ., concurred: RICHARDSON, J, dissented.

Cheves, for the motion. *Black* and *Arthur*, contra.

See *Dillon* vs. *Watkins*, 2 Sp. 445. *Byne* vs. *Byne*, 1 Rich. 438. *Wigfall* vs. *Byne*, 1 Rich. 412. *An.*

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*56] *JOHN T. SEIBLES *vs.* THOMAS B. BLACKWELL.

The opinion of witnesses as to the existence of disease in a negro, who had not the aid of science to guide them, are inadmissible, unless sustained by facts showing the opinion to be true.

The plaintiff, in an action on the covenant of warranty of soundness, where there has been a recision of the contract, or where the property is dead or valueless, is entitled to recover back his purchase money and interest. And when he has offered to restore the property to the defendant, and he has refused to accept it, and the plaintiff is compelled to keep the property and incur expense on account of it, he may also recover such expenses.

Before GANTT, J., at Newberry, Fall Term, 1840.

Judge's Report.

This was an action of covenant, for breach of warranty in the sale of a negro by defendant to plaintiff. Verdict for plaintiff.

I thought that if the plaintiff was entitled to recover under the evidence, he might recover also what had been paid for medical assistance afforded the negro, and also for the expenses of her burial. I have no particular recollection of the testimony disclosed by the publication and reading of the several examinations taken by commission. I certainly did not sanction as evidence any expression of opinion merely on the part of the witnesses, not founded on the development of facts. I

thought it doubtful whether, under the evidence, the jury could find for the plaintiff, and expressed no opinion as to the course they should pursue, but left the case with them on the evidence furnished. I enclose the notes of the evidence.

Defendant appeals for a new trial and in arrest of judgment:

1. Because his Honor charged the jury that they might include in their verdict what they thought reasonable for medical attention and burial expenses.

2. That his Honor admitted evidence of burial expenses and medical attention on said negro girl, although no evidence was adduced to show that he had incurred any expenses or paid a medical bill.

3. Because his Honor *admitted the opinion* of the witnesses (who had been examined by commission) to be read in evidence, although objected to in the cross examination.

*4. Because the evidence is wholly insufficient to warrant the verdict [*57 found by the jury.

5. Because his Honor erred in not charging the jury that the opinion of the witnesses taken by commission was incompetent and should be disregarded.

6. Because the verdict is in other particulars contrary to law and evidence.

Curia, per O'NEALL, J. The third and fifth grounds are, in effect, the same. Both question the propriety of receiving and considering the opinion of witnesses as to the existence of disease in a negro. It is true that the mere opinion of witnesses who have not the aid of science to guide them, would not have any weight in such a case, and would be generally inadmissible, unless sustained by facts showing the opinion to be true. On looking in the mass of written evidence in this case, I find that the witnesses generally said they thought the slave to be unsound, and if they had stopped there such testimony ought to have been rejected; but they go on to fortify their opinions with facts showing some foundation for them; and hence they were admissible, and were to be compared with the facts by the jury.(*a*) The fourth and sixth grounds are general objections to a verdict on a very doubtful case of fact, and hence can have no weight here. The second ground need not be noticed, as by the view we take of the first ground, the subject of its complaint will be removed.

The first ground makes the only legal question in the case; and to it we will now direct our attention. The action is covenant on a breach of warranty of soundness contained in the defendant's deed: accompanying the breach of the warranty of soundness, the plaintiff states as one of the consequences of it, in his declaration, that he "was put to great expense and trouble, to wit, to the amount of $200 in and about her physician's bill, burial expenses, and other expenses." This is a sufficient statement of the plaintiff's loss to entitle him to recover the physician's bill and burial expenses, amounting to $16, if by law he can be permitted to recover them under the proof adduced in this case. The plaintiff in an action on the covenant of warranty of soundness, where there has been a recision of the contract, or where the property* is dead or valueless, is entitled to recover back his purchase money and [*58 interest. In some cases, where he has offered to restore the property to the defendant, and he has refused to accept it, and the plaintiff is com-

(*a*) 5 Strob. 177. *An.*

pelled to keep the property and incur expense on account of it, he may also recover such expenses. In 2d Camp. 82, *Carwell* vs. *Coare*, the very point now before us received the consideration of Ch. Justice Sir James Mansfield. That was an action on the warranty of a horse, with a count for horse meat, &c. There had been no offer to return the horse: the question was, whether the plaintiff could recover for his "*keep.*" Sir James held that he could not. He said, "I remember when it was held, that an action could not be maintained upon the warranty without an offer to return the horse. That doctrine is now exploded; but still, unless the defendant refuses to take back the horse, the plaintiff cannot complain that the expense of the keep is necessarily thrown upon him. By not offering to return the horse before bringing the action, he intimates that he still considers the animal as his own, and he therefore ought to maintain him at his own expense."(*a*) The rule thus stated meets our approbation. We think no expenses attending the property ought to be recovered, unless there has been an offer to restore the possession to the vendor before they were incurred. For as soon as disease is discovered, it ought to be communicated to the vendor, and the opportunity presented to him to take the property in his own charge If this is done he may comply with the offer at once; if he does not, then he compels the vendee to incur all necessary expenses about the keeping and preservation of the property. In this case there was no offer by the vendee to return the property to the vendor. There was ample time to have done so after the discovery of the unsoundness and before the death of the slave. The motion for a new trial is granted, unless the plaintiff should release the physician's bill and funeral expenses, amounting together to $16; if, however, he should so release, the motion is then, in that event, dismissed.

The whole Court concurred.

Fair and *Summer*, for the motion. *Caldwell*, contra.

(*a*) See *Carter & Harden* vs. *Walker*, 2 Rich. 45.

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*59] *S. Percival *ads.* A. Herbemont, *adm'r.*

The plaintiff and defendant entered into a special written agreement to submit the matters in dispute between them to counsel: but no particular counsel was named, or time when the matter was to be submitted—defendant agreeing to pay according to the instructions of the counsel; and in default of their getting a decision, then the plaintiff was to file a bill in the Court of Equity, and the decree of that Court was to be conformed to by the defendant. This was held to be an agreement to arbitrate.

An agreement to arbitrate, or a bond to submit to arbitration, may be the subject of a suit, when the damages stipulated, or the penalty, will authorize a recovery; but such an agreement or bond would not deprive either party of his remedy in the Courts, or oust them of their jurisdiction in regard to the matter in dispute.

A vineyard, though not annually planted, requires great preparatory attention, as well as much agricultural labor and cultivation to bring the fruit to perfection, and the products arising therefrom may be denominated a crop; and hands employed in agricultural pursuits, whether in a vineyard or a cornfield, are liable to be retained by the administrator of an estate, after the first of March, until the crop is gathered, or at farthest until the last of December, should the crop not be gathered before that time.

Before EVANS, J., at Richland, Fall Term, 1840.

The late Mr. Nicholas Herbemont was entitled to the slaves, hereinafter named, for life. He died in June. Among the negroes, some were employed about the vineyard, some were house-servants, some worked on the farm, one was a ditcher, and one a cooper and job carpenter. After the death of Mr. Herbemont, a difference of opinion arose between the plaintiff, the administrator, and the defendant, Dr. Percival, who represented the remainder-men, as to which and how many of the negroes the plaintiff was entitled to retain under the Act of Assembly, which provides that if one entitled to a life-estate in negroes, die after the first of March, the negroes shall remain on the plantation until the crop is finished. For the purpose of settling this controversy amicably, a written agreement was entered into, by which it was agreed the negroes should be delivered to Dr. Percival, except two; and he agreed to pay hire for such of them as the counsel of the parties should decide the plaintiff was entitled to; and on default of such decision, the plaintiff was to file a bill in Equity, which was to include all the matters in controversy between *them, and the defendant agreed to pay for such as equity should decide [*60 the plaintiff was entitled to, and such hire as that Court should decree. Without regard to this agreement, the plaintiff brought this action for negro hire. The defendant pleaded the general issue, and a special plea in bar, setting out the agreement. The plaintiff took issue on the first plea, and demurred to the second.

If this plea and the demurrer had been brought to my view at the opening of the case, I should, I think, have sustained the plea, because, where there is a binding contract still subsisting between the parties, the action should be special on the contract. But I was not informed of this until all the evidence had been given. I thought it best, at that stage of the case, to sustain the demurrer, and send the case to the jury on the facts.

I thought and so charged the jury, that the word *crop* was to be taken in its popular sense, and meant any annual product which was the result of culture; and in this sense, wine was included in the term; and that the plaintiff was entitled to keep the negroes employed about the vineyard, so long as was necessary to convert the grapes into wine.

It appears, from a memorandum made by the jury, and returned with their verdict, that they allowed hire for Glasgow, William, George, Yorick and Moses, and that hire was allowed from the time they went into the defendant's possession, to the 1st of December. The evidence in relation to these negroes was this:

McDaniel was overseer at Palmyra, where there were twenty acres of vines; besides these, he cultivated eight and a half acres of corn, and one acre and a half of potatoes. He said Yorick was a vine dresser, and did nothing but attend to the vineyard; Glasgow split rails about a month; and at the time of Mr. Herbemont's death, in June, he was ditching at the farm, near Columbia; after that he, as well as the rest, worked in the field until they were delivered to the defendant. William was a cooper and jobbing carpenter; George was a small boy, thirteen years old, and employed as a house-servant. Moses did not work in the field. At the season of making wine, all the negroes were usually

employed at that business; but that year, the grapes nearly all rotted. Besides the farm at Palmyra, there was another of small extent, fifteen
61*] or twenty acres, near Columbia,* where one Miller was employed as a laborer. His account of the employment of the negroes, above named, as well as that of Mrs. Marshall, was substantially the same as McDaniel's.

Mr. Guiguard bought the grapes from the plaintiff, in August. The grapes were very much rotted; twenty hands, in two or three days, gathered them; they might have been gathered by from two to four hands, but for the rot. The vintage usually over by the 1st September. Gave $50 for the grapes, and made one hundred gallons of wine. There were casks enough on hand for ten times the quantity of wine made. A cooper would be needed only two or three days to tighten the casks. A good deal of work necessary on a vineyard. The notice of appeal, with a copy of the plea in bar, is annexed to the report.

SPECIAL PLEA.

And for further plea in this behalf, the said Samuel, by leave of the Court, for this purpose, first had and obtained, says that the said Alexander ought not to have or maintain his aforesaid action thereof against him, because he says that heretofore, to wit, on the twenty-fifth day of July, eighteen hundred and thirty-eight, at Columbia, aforesaid, there being then and there a difference of opinion between the said Alexander and the said Samuel, one of the executors of the last will and testament of Mrs. Caroline Herbemont, deceased, amongst other things, respecting the right to the possession and service, during the remainder of the year aforesaid, of some of the slaves bequeathed by the said Mrs. Caroline Herbemont to the said Nicholas Herbemont, during life, and after his death to other legatees, to wit, the said slaves, named in the said bill of particulars annexed to the declaration aforesaid of the said Alexander, for the purpose of adjusting the same in the most amicable manner, the said Alexander and the said Samuel agreed, in writing, amongst other things, that all of said slaves should forthwith be delivered up to the said Samuel, as executor as aforesaid, except Moses and Yorick, and that said Moses and Yorick should be retained by said Alexander, as administrator, as aforesaid, until the wine from said year's grapes should be made, when they should also be delivered
62*] up to said Samuel, as executor as aforesaid; and that the said *Samuel, as executor as aforesaid, should pay to said Alexander, administrator as aforesaid, for the service and labor of such of said slaves as he, the said Alexander, as administrator, as aforesaid, was entitled by law to keep, after the death of said Nicholas, and for the length of time he, the said Alexander, was entitled to keep the same, whatever amount their counsel should agree upon; and in case the counsel of said Alexander and Samuel should not agree, then that the said Samuel would pay the said Alexander whatever the Court of Equity would determine, in lieu of such service and labor; and that the said Alexander should file a bill in the Court of Equity for that, amongst other purposes. And the said Samuel avers that under and by virtue of said agreement, so made as aforesaid, he had the possession, service and labor of said slaves, and that the counsel aforesaid have not settled the amount which the said Samuel should pay the said Alexander therefor, and that the said Alexander has not yet filed his bill in the said Court of Equity for that purpose, nor has the same been determined by the said Court of Equity; all which the said Samuel is ready to verify; wherefore he prays judgment, if the said Alexander ought to have or maintain his aforesaid action thereof against him, &c.

COPY OF MEMORANDUM.

We find for the plaintiff, as follows:

4	months hire of Glasgow, from 1st August to the 6th December, at $12 - - - - -	$48.00
3	do. Yorick, 1st Sept. to 1st Dec. - - - -	36.00
1	mo. William, carpenter, - - - - -	20.00
4	mos. Silvia, 1st Aug. to 1st Dec. at $6 - - -	24.00
4	do. Camilla, - - - - - -	24.00
4	do. Malvina, - - - - - -	24.00
4	do. boy George, at $3 - - - -	12.00
2½	do. Moses, 15th Sept. to 1st Dec. - - - -	20.00
		$208.00

GROUNDS OF APPEAL.

The defendant in the above case gives notice that he will move the Court of Appeals to reverse the decision of his Honor, the presiding Judge, sustaining the demurrer to defendant's plea, upon the ground that said plea was sufficient *in law to bar the plaintiff's action, and that the demurrer should have been overruled. [*63

And failing in that motion, the defendant will move the Court of Appeals for a new trial, upon the following grounds:

1. Because the agreement between the parties, offered in the evidence, was a bar to plaintiff's recovery.

2. Because the verdict of the jury, finding hire for a greater number of slaves than were employed in the crop, and for a longer time than they were thus employed, to wit, for the hire of the slaves, Glasgow, William and George, who were not employed in the crop at all, and for the slaves Yorick and Moses, who were not employed in the crop, but in the vineyard, and after the vintage was finished, was totally contrary to the testimony, as well as the law in relation thereto.

3. Because his Honor, the presiding Judge, erred in instructing the jury that grapes constituted a crop within the meaning of the Act of 1789, and that the common law of emblements does not apply to said act.

Curia, per BUTLER. The first thing in this case is to ascertain the character and decide on the effect of the special plea in bar filed by the defendant. The plea sets out a special agreement, by which it appears that the plaintiff had delivered up to the defendant certain slaves which came into his possession at the death of his intestate, and had retained for a specific purpose two others; and that defendant was to pay such a sum for the hire of those he took as should be determined on by the counsel of the parties, or by the Court of Equity; and the plea alleges that no sum had been agreed on by the counsel, nor had the plaintiff filed his bill in the Court of Equity. But it does not aver that defendant had applied to counsel to have the matter adjusted himself. The agreement does not indicate the time of adjustment, or specify the names of the counsel who were to act as referees, nor does the plea aver any matter of the kind. It seems to have been the object of the parties to submit the matter in controversy to arbitration; and this is the true character of their agreement. An agreement to arbitrate, or a bond to submit to arbitration, may be the subject of a suit, where the damages stipulated, or the penalty, will authorize a recovery. But such an agreement* or bond would not deprive either party of his remedy in the Courts, or oust them of their jurisdiction in regard to the matter in dispute. This agreement is [*64

indefinite and uncertain in its terms and provisions, and whether either party could have recovered any thing in an action brought upon it, it is now unnecessary to determine. But we are all of the opinion that it does not operate as a bar to this action. Since the case of *Thompson* vs. *Charnock*, (8 T. R. 139,) it has never been questioned that an agreement to refer all matters in difference to arbitration is not sufficient to oust the Courts of their jurisdiction. This decision has been frequently referred to and approved by the English Judges, both of Law and Equity. (2 Ves. 129; 6 Ves. 815; 2 Atkins. 569.) To determine the other grounds of appeal, we must look at the situation and rights of the parties as they stood at the death of Nicholas Herbemont. At that time it is conceded that the defendant, who represents the remainder men, had a right to take into his immediate possession all the slaves held by the tenant for life, that were not employed in making a crop—such as house servants, artizans not connected with the farm, &c.; and that plaintiff had a right to retain till the crop was gathered (or the last day of December,) all the hands that were employed in making a crop. And I take it that all hands that were necessary to, or fairly connected with, the farm, might be retained by him; no matter what might have been their particular employment at different times. For on a farm, hands must sometimes be engaged at one thing and then at another. The first part of the 23d clause of the Act of 1789, (5 Stat. 111, § 3,) is as follows: "That if any person shall die after the first day of March in any year, the slaves of which he or she was possessed, whether held for life or absolutely, *and who were employed in making a crop*, shall be continued on the lands which were in the occupation of the deceased, until the crop is finished, and then be delivered to those who have a right to them." It was contended by the counsel for the defendant, who argued the case with much learning, that the meaning of crop should be restricted to the cultivation of such things as would have been regarded as emblements at common law; that the fruit of the grape vine, like other fruit growing on trees, could not be regarded as emblements; *and therefore that those hands that were employed about the vineyard were not engaged in making a crop within the meaning of the law. The ancient notion of emblements was, that he should reap all that he had sown; and in England it applied particularly to corn and other annual vegetable productions that depended on planting and cultivation. The construction of the Act of '89, cannot be restricted to such a meaning when it uses the word crop. For in South Carolina the usual crop at the time the Act was passed consisted of tobacco, indigo, rice and Indian corn, which were to be put into the ground after the first of March, when the right of the administrator of a tenant for life attached The slaves were not to be retained to reap and gather a crop which had been planted by the deceased, but which was to be planted and cultivated by his administrator or executor.

*65]

Before March, hands are usually employed in clearing, repairing fences, breaking up land, and preparing for a crop; and it is hands thus employed that are to be retained by the executor—hands employed in the business of agriculture. A vineyard, though not annually planted, requires great preparatory attention as well as much cultivation to bring the fruit to perfection. The product depends on labor and industry in

the cultivation of the soil; and I cannot well perceive why there may not be a crop of grapes, as well as any vegetable production depending on cultivation. In England, emblements may be confined to such *vegetables* as require labor and attention, and may not extend to fruit either growing on trees or vines; but our Act contemplates such *crop as require* agricultural labor to bring them to perfection; and all hands being employed in such labor, whether about a vineyard or a corn field, are liable to be retained by the administrator, after the first of March till the crop is gathered, (or at farthest till the last of December, should the crop not be gathered before that time.) This brings me to the question, has not the plaintiff recovered for more hands than were employed about any crop, and for time beyond the period when the crop was actually gathered? And it appears evident to me he has; for he has recovered for the hire of Yorick and Moses after the vintage was over, and for George, who was a house servant, and never employed in the crop. The sums allowed for these amount to sixty-eight dollars. Unless the plaintiff will release *this sum, a new trial is ordered; but should [*66 he think proper to release that amount, the verdict will stand good, and is affirmed for the balance.

The whole court concurred.

Gregg and *Gregg*, for the motion. *Cheves*, contra.

BAKER, JOHNSON & CO. *vs.* ABNER BUSHNELL.(*a*)

Before requiring a defendant, who applies for his discharge under the *Insolvent Debtor's Act*, to join in an issue to try the fairness of his schedule, there ought to be some showing by affidavits; but if the plaintiff, without affidavit, makes the charge by suggestion, and the defendant pleads, he waives his right to call for affidavits; he admits by his plea that there is something to be tried by a jury.

Before GANTT, J. at Edgefield, Fall Term, 1840.

This was an application to be discharged under the insolvent debtors' Act. The discharge of the prisoner was opposed on an allegation of fraud, but no affidavits containing the facts had been filed. Under the authority of the case of *Faber* vs. *Zylstra*, I permitted the oath to be administered to the prisoner. The direction of the presiding Judge that an issue should be made up, neither could nor was intended to supercede the requirements of the law. The case referred to of *Faber* vs. *Zylstra* was designed as a precedent in all future cases.

The plaintiffs and creditors in this case appeal, and now move the Court to reverse the order of the presiding Judge for the prisoner's discharge, and also for leave to suggest fraud in the schedule of the prisoner, on the grounds:

*1. Because the issue to try the question of fraud in the schedule [*67 of the prisoner, which was joined by the parties, dispensed with the necessity of affidavits suggesting fraud.

(*a*) * S. C., *Infra*, 272. *An.*

2. Because the direction of the Judge that the issue be made, and the issue being made accordingly, is surprise to the creditors, and prevented them from filing affidavits suggesting fraud in the schedule of the prisoner.

Curia, per O'NEALL, J. In this case the defendant applied for the benefit of the insolvent debtors' Act. His application was opposed on the ground of fraud. A suggestion making that allegation was filed, to which the defendant pleaded, and issue was joined. The defendant after this moved to be discharged, because no affidavits showing the truth of the charge of fraud had been filed; and it was so ordered by the presiding Judge; and we are now called upon to reverse that order.(*a*) The insolvent debtors' Act, in its first section, (P. L. 247–8,) defines the cases in which a party may have the benefit of its provisions, and prescribes the terms and mode by and according to which he may avail himself of its provisions; among these, he is required to exhibit a petition to any of the courts of law from whence such process issued, certifying the cause of his imprisonment, together with an account of his real and personal estate. When he applies to be discharged, he is required to swear *inter alia*, "that the account may be delivered into this honorable Court, with my petition to this Court, doth contain a true and full account of all my real and personal estate, debts, credits and effects whatsoever, without exception." The Act then directs "if the Court shall be satisfied with the truth" of said oath, that the prisoner, upon making an assignment, shall be discharged. The truth of the oath is a preliminary inquiry; and as was said in *Faber* vs. *Zylstra*, (2 Bay, 147,) it may sometimes be answered by an examination to be made by the Court; sometimes it may require the aid of a jury; and most generally that is the course to be pursued. Before requiring the defendant to join in an issue to try the fairness of his schedule, there ought to be some showing by affidavits which make out *prima facie* a case of fraud. This practice has the sanction of the case of *Faber* vs. *Zylstra*, (2 Bay, 147. But it does not follow that because this is the usual and general rule, that it is so
*68] inflexible *as to admit of no exception. Like every other rule of practice, it is intended to aid the parties in getting properly before the Court. But after they are at issue, there can be no ground to say it ought any longer to have application. The object of the affidavits is to justify the Court in calling for the aid of the jury to say whether the prisoner's oath is true. If without affidavits the plaintiff make charge by suggestion, and the defendant pleads, he waives the right to call for affidavits; he admits by his plea there is something to be tried by a jury. It cannot alter this view that the issue was made up under the order of the Judge; indeed, it strengthens the case for the plaintiffs. For it is not to be presumed, that the Judge would, without any cause, order such proceedings. The great end of the insolvent debtors' Act is answered by a liberation of the prisoner, if his oath be true, at the term of the Court to which he applies. If the issue charging fraud was made up and ready to be tried, all the ends of justice would have been answered by its trial. They are, however, wholly subverted by quashing that issue, and discharging the defendant, because a requisite preceding the filing of the suggestion had not been complied with.

(*a*) 4 Stat. 56. *Rep.*

The motion to reverse the decision of the Judge below is granted.

RICHARDSON, EARLE, BUTLER, JJ., concurred: EVANS and GANTT absent.

Griffin and *Burt*, for the motion. *Carroll*, contra.

See Rice, 268. 1 Rich. 3. 6 Rich. 293. 3 Strob. 365. *Ex parte Moffitt*, 11 Rich. 360.

Ex parte JAMES BIGGERS. [*69

By the Act of 1833, courts martial have the power to try captains of patrol for neglect of duty as patrols, and impose the fine of twenty dollars, specified in the Act of 1819, for the non-performance of patrol duty, and no other Court has cognizance of the matter.

Courts military, or courts martial, are a part of the law of the land, within the meaning of the constitution and of *magna charta;* and form the most appropriate tribunal for all that class of offences which is created by the patrol laws, so inseparably connected with the laws regulating the militia.

A captain of patrol failing to make a return, on oath, is guilty of a neglect of duty, and may be returned to the Court as such.

The Act of 1837, does not confer any new power, but is merely declaratory of the meaning of the Act of 1833. It is more explicit, but not more potential.

Before BUTLER, J., at York, Spring Term, 1840.

This was a suggestion for a prohibition to restrain the collection of a patrol fine. The facts set forth in the suggestion were, that James Biggers had been appointed captain of a patrol company, and had performed his duty in all respects, except in making a return on oath of his actings. That he was summoned to attend a court martial, and fined twenty dollars. That he pleaded to the jurisdiction of the court, on the ground that the fine of twenty dollars imposed on a captain of a patrol company, for failing to make a return, was to be recovered in a particular manner specified in the Act of the Legislature by *indictment*. The case came on for trial before Butler, J., who delivered the following opinion: "I refuse the motion for a writ of prohibition in this case. By the Act of 1819, (Mil. Laws, 103, sec. 10,) (*a*) it is made the duty of captains of patrols to return on oath the performance of their duties to the captain of the beat company, under a penalty of twenty dollars, to be recovered in a court of sessions. By the Act of 1833, sec. 29, p. 147, (*b*) jurisdiction is given to courts martial to try all defaulters therein enumerated, for non-performance or violation of any duty required by law, and also for non-performance of patrol duty. The Court has not only power to try defaulters for non-performance of duty at muster, but for non-performance of any other duty required by law, enumerating patrols; and it is made the duty of the captains of beat companies to give information to courts martial of all neglect of the duties required by law of those under their command. *Why require information to be given if the courts have no jurisdiction? To fail to make a return on oath [*70

(*a*) 8 Stat. 540. *An.* (*b*) 8 Stat. 573. *An.*

by a captain of patrol is a neglect of duty, and may be returned to the court as such. I regard the Act of 1837,(*a*) as but declaratory of the meaning of the Act of 1833, and not as conferring new power. It is more explicit, but not more potential.

James Biggers appeals from the order of his Honor, Judge Butler, refusing the writ of prohibition, on the following grounds :

1. Because, under the Act of the Legislature passed in 1833, courts martial have no right to impose a fine of twenty dollars on the captain of a patrol company for failing to make a return on oath of his actings and doings.
2. Because, under no Act of the Legislature have courts martial the right to impose a fine of twenty dollars on the captain of a patrol company.
3. Because the court martial acted without jurisdiction, and his Honor should have granted the writ of prohibition.

Curia, per EARLE, J. The question is upon the construction of the Act of 1819, (*b*) concerning the performance of patrol duty, and of 1833, to provide for the military organization of the State ; and although the Act of 1837 has made it certain that no such case can arise again, yet as the relator complains of having been subjected to a mode of trial, under the Act of 1833, which was unlawful, it becomes necessary to inquire if the court martial had rightful jurisdiction. The Act of 1819 concerning the performance of patrol duty, requires the commanding officer of every beat company, at every regular petty muster, to prick off from the roll of each patrol district any number of persons, at his discretion, to perform patrol duty until the next regular petty muster ; and shall appoint some prudent and discreet person as commander ; and in case either shall fail to perform the duty required, imposes a penalty of thirty dollars, to be recovered by indictment. Another section provides that each captain of patrol shall make a return, upon oath, of the performance of his duties as commander of the patrol, to the captain of the beat company, at the regular times required by the Act, under the penalty of twenty dollars, to be recovered by indictment.

*71] *By the Act of 1833, to provide for the military organization of the State, it is alleged that a different tribunal has been provided for the trial of defaulters in relation to patrol duty ; and to understand the question, as well as the solution of it, reference must be made to the words of the Act. "Sec. 30. Each colonel of a regiment shall have power to order courts martial, for the trial of all officers under his command, except field officers, to consist of not less than five nor more than thirteen officers, one of whom shall be a field officer. And it shall be his duty to detail courts martial, to consist of at least three commissioned officers, who shall meet, &c., to try all defaulters at company, battalion or regimental musters ; and all non-commissioned officers, privates or fatigue men, for the non-performance or violation of any duty required by law, as well as for disobedience of orders, and for non-performance of patrol duty." The argument in behalf of the relator is, that in as much as the particular default charged against him is not enumerated amongst the subjects of jurisdiction assigned to the courts martial, the mode of proceeding by indictment under the Act of 1819 is not taken away. But it should be kept in mind, in construing these Acts, that

(*a*) 8 Stat. 593, § 10. *Am.* (*b*) 8 Stat. 538. *Am.*

the system of patrol duty has been engrafted upon, and forms part of, the militia system; and although in point of fact the duties are apparently very dissimilar in their character and objects, and those of the patrol seem to belong to the citizen rather than the soldier, yet the system of patrol has always in this State been regarded as a military police, and to be an appendage of the militia organization. The patrol districts are to be laid off within the beat companies, by the captains, who are required to make and keep a roll of persons liable in each district to perform patrol duty; and at *every regular petty muster*, to prick off those who shall perform the duty until the next muster; and the 7th, 8th and 9th sections enact certain penalties on the patrol men for neglect of duty, to be imposed by the company courts martial. It seems to have been a departure from the spirit of the Act to proceed by indictment against the captain of the beat for not appointing the patrol, or the captain of the patrol for not performing the duty required. And when we come to examine the Act of 1833, on the jurisdiction of courts martial, it will seem reasonable to conclude that the purpose of the Legislature was to produce *entire uniformity in the system, by subjecting all who were required to perform any duty in relation to [*72 the patrol to the same species of military cognizance. There can be no reason why a private patrol man should be tried by a court martial, for disobedience of orders or neglect of duty, and his captain of patrol should be tried by indictment, for not turning out once a fortnight, or for not making his return at the next company muster. The terms of the Act of 1833 are abundantly comprehensive—"to try all defaulters at company, battalion, or regimental musters; and all non-commissioned officers, privates or fatigue men, for the non-performance of any duty required by law, as well as for disobedience of orders, and for non-performance of patrol duty."(*a*) The captain of patrol is required to make his return on oath, at the regular company muster; and whether he be styled non-commissioned officer or private, he has been guilty of a default at a company muster, has failed to perform a duty required of him by law, in relation to the patrol, and comes within the class of persons subject to the jurisdiction of company courts martial. That this is more explicitly declared by the 10th section of the Act of 1837, does not weaken the view taken by the Judge below, or by the Court here. It was doubtless intended to remove doubts which might arise on the former Acts; declaratory only of what the intention of the Legislature was. The leaning of Courts is to extend and sustain the right of trial by jury; but it should not be forgotten that courts military, or courts martial, are also a part of the law of the land within the meaning of the constitution and of *magna charta*, and form the most appropriate tribunal for all that class of offences which is created by the patrol laws, so inseparably connected with the laws regulating the militia.

The judgment of the Court below is affirmed.

GANTT, RICHARDSON, EVANS and BUTLER, JJ., concurred: O'NEALL, J., dissented.

Williams, for the motion. *Alston*, contra.

(*a*) *Post*, 502.
(*b*) See Act of 1839, 11 Stat. 61. *An.*

*73] *KERSHAW & GILLMAN *vs.* R. STARNES.
THE SAME " M. LATHAM.
THE SAME " S. SMITH.
THE SAME " G. W. DAVIS.
THE SAME " C. TIMBERLAKE.
THE SAME " J WILLSON.

A surveyor acting under a rule of Court cannot be allowed for his representation of separate tracts, on his plat, when they are no part of the land claimed by the parties, and are merely put down on the plat as boundaries or evidences of the identity of the location. He is only entitled to pay for one plat. But where the plaintiffs claim under two grants, and both are represented on the same paper, and also a grant or grants conflicting with those upon which the defendants rely, for each of these the surveyor may be allowed to charge.

Where there are several cases, all depending upon the same location, the surveyor is only entitled to pay for one plat.

Before EVANS, J., at York, Fall Term, 1840.

Judge's order made on circuit.

These were actions of trespass to try title. There was a verdict for the plaintiffs in the two first cases, and for the defendants in the other cases.

Both parties have appealed from the clerk's taxation of costs, and I am to decide whether the taxation allowed by the clerk is right. I will consider, FIRST, *the defendants' exceptions* to the clerk's taxation.

The first ground sustains the general rule that costs are allowed only for services actually rendered. The commission issued in the case of Starnes. It can be taxed only in that case.

The second exception is also sustained. It appears from the clerk's report that the surveyor, Campbell, was employed only seventeen days in making the survey in all the cases. The fee bill of 1791(*a*) says, the surveyor shall be allowed, whilst on the survey, fourteen shillings per day. The surveyor, although appointed by the Court, is the surveyor of the party. The party for whom he acts is bound to pay him at the rate of fourteen shillings per day whilst employed in his service, and if he succeed in the case may tax as his costs such sum as he has paid or is liable to pay to his surveyor. Campbell could not charge the plaintiffs more than three dollars per day for every day he was on the survey. In
*74] these cases the plaintiff *recovered against two of these defendants, and is entitled to tax his surveyor's costs against them. But as the survey was made for both cases, he cannot tax the whole amount against each, but must tax it against one, or half against each. This disposes of the third and fourth grounds.

5. The surveyor is allowed for a plat of the land in dispute. On this plat he should represent every thing necessary to explain it. The representations of surrounding lands are but explanations or representations of what is necessary to the understanding of the dispute between the parties. I am of opinion, therefore, the exception must be sustained. The surveyor is entitled to only one plat in each case.

(*a*) 5 Stat. 154.

I think the Clerk should have allowed the charge for the chain carriers. It was an incidental and necessary expense.

SECOND. *Plaintiffs' Exceptions.*—I am of opinion the first objection must be overruled. The fee bill of 1827(*a*) allows the attorney for a commission or cross interrogatories eight dollars. And if, as I understand, each defendant put in cross interrogatories, he is entitled to his costs. The plaintiffs' second, third and fourth exceptions relate to the surveyor's cost, and must be governed by the same rules as the defendants'.

Ordered, that the clerk do reform his taxation according to the principles stated above.

The plaintiffs appeal from, and move to reverse the decision of his Honor, Judge Evans, on the following grounds:

1. Because in sustaining the defendants' second exception, he erred in not allowing the surveyor his per diem pay in each case in which the plaintiffs succeeded.

3. Because he should have allowed the surveyor ten shillings, not only for the general plat in the case, but also for each representation of surrounding lands, which were the subject of grants or conveyances, they being necessary to explain the plaintiffs' location.

Curia, per EVANS, J. This is a question of costs, and must be decided by the fee bill. It is said the plaintiffs' land could only be located by the surrounding tracts, and that therefore the location and delineation of these on the plat was indispensable to the understanding of the plaintiffs' claim: accordingly, the surveyor has represented and laid down on his plat *all these surrounding tracts, as well as those under which [*75
the parties claimed. For each of these tracts of land the surveyor claims to be allowed ten shillings, and the question submitted to this Court is, whether such allowance is consistent with the fee bill. The words of the fee bill of 1791 are, "for making out a fair plat, certifying, signing and returning the same, ten shillings" The rule of Court in this, as in other cases, I presume, required the surveyor to survey the land in dispute between the parties, and to return a plat thereof to the Court. The plat which he is required to make is a representation of the disputed land. The boundaries, whether they be marked trees, water courses, or surrounding tracts of land, are but component parts of the plat he is required to make. They are but the evidences of the identity of the land claimed; and I can see no more reason for allowing additional compensation where the boundary is an adjoining survey, than where it is a river or creek, or any other natural or artificial boundary. It is his duty to search out the lines of the land, and when he has done so and fixed the location, to return a plat thereof to the Court. For searching for the lines he is allowed three dollars a day, and for a plat of the land he is allowed ten shillings. Every thing beyond the representation of the land in dispute is inserted as the evidences of identity. If the boundary be identified by marked trees, he puts them down on the plat; if by a river, he does the same; and if by the adjoining survey, he represents that on his plat; but these are put down only as evidences of the identity and true location of the land. They are component parts

(*a*) 6 Stat. 333. *An.*

of the plat, but all put together make but a plat of the land. For these reasons, I am of opinion that the surveyor cannot be allowed for those separate tracts represented on the plat, which was no part of the land claimed by the parties, and put down on the plat only as boundaries or evidences of identity. In these cases the plaintiffs claim under two grants. These are both represented on the same paper, and also a grant or grants conflicting with those upon which the defendants rely. For each of these I am of opinion the surveyor may be allowed to charge. Such seems to have been the opinion of the Court in the case of *Sturgenecker* vs. *Marsh*, (1 Bail. Rep. 592.) Upon reconsideration, I think the circuit decision made by myself, allowing the surveyor ten shillings as for
*76] one plat in each of the cases, was *wrong; and the taxation of the cost must be reformed by the Clerk accordingly.

The motion is dismissed as to the other ground.

The whole Court concurred.

Allston, for the motion. *Williams*, contra.

E. Carson *vs.* W. Hill and T. F. Jones.

A blank note signed by a firm, with sureties thereto, and by one of the firm placed in the hands of the plaintiff, a factor in Charleston, as collateral security for acceptances of drafts, to be drawn on him by the firm, and afterwards filled up in good faith by the plaintiff, in accordance with his instructions, with the sum of $5000, the sum agreed on by them at the time the note was left, was held not to be void, and that the plaintiff had the same right that an endorsee would have to fill up the terms of an endorsement above the name of his endorser. (*a*)

The plaintiff, after he accepted drafts drawn by the firm, to the amount of $7,500, acquired as perfect a right to the note as if he had bought it; and his right could only be divested, and the defendants' liabilities discharged, by payment.

All the payers to a joint and several promissory note are principals, and their relation to each other does not affect their liability to the payee.

Where a guaranty is absolute in its terms, and definite as to its amount and extent, in such case no notice to the guarantor is necessary.

Where a debtor does not direct the application of money paid to any specific demand, where there are two or more, the creditor who receives the money may make his own application. (*f*)

The surety is bound by the terms of the contract, and cannot be discharged unless the principal varies the terms of the original contract, by enlarging the time of performance. (*g*)

Before Butler, J., at Laurens, Fall Term, 1840.

This was an action of assumpsit, on a joint and several promissory
*77] note, signed by the defendants. Wm. Hill was *out of the State at the commencement of the action—Davis had suffered judgment to go against him by default, and the defendants Wiley Hill and Jones, were the real parties to the issue. The manner in which the note was

(*a*) Cited 6 Rich. 507. 3 Rich. 113. *An.* (*f*) See 11 Rich. 468. *An.*
(*g*) See *Comwell* vs. *Holly*, 5 Rich. 56. *Wayne* vs. *Kirby*, 2 Bail. 551. *Pickett* vs. *Lands*, 2 Bail. 608. 4 Strob. 20, 90. 1 Bail. 418. Post. 145. *An.*

signed filled up and used, is important, and will appear from the following statement: William Hill and W. G. Davis had entered into a mercantile copartnership, and were doing business under the firm of Davis & Hill, at Laurens, during the year 1835. They had contracted debts in Charleston, to a large amount; and not having cash in hand to meet them, in 1836, when they fell due, they procured the note upon which this action is brought, to be signed by Wiley Hill and Thomas F. Jones, below their own names, in blank, with $5000 inserted at the top of the paper. The paper was then signed in March, 1836, and delivered to William Hill, to be used by him in Charleston as he might think proper. *Without* filling up the body of the note, Hill deposited it with the plaintiff, as collateral security, to indemnify him, for acceptances of drafts to be drawn on him by Davis & Hill in favor of their creditors, from whom they had purchased goods in Charleston. Carson accepted drafts to the amount of about $7000, on the faith of the paper which he held in blank. These drafts fell due six month after their date. Besides these drafts, Carson advanced, during the years 1836, 1837, and 1838, other large sums of money for Hill and Davis, and for Davis alone, who was the active partner, at Laurens, not only to close the concern, but in conducting business on his own account. The drafts drawn by Hill & Davis on the plaintiff, fell due on the 1st September, 1836, at which date the defendant filled up the note in the terms of an ordinary joint and several note of $5000, payable six month after date. After it was thus filled up, Carson deposited it with Martin & Walter, as collateral security to cover liabilities which Carson was under to them. It remained with Martin and Walter until it was taken away by plaintiff and sent up to be sued on, which was in 1839. Some time in 1838 Carson wrote to Davis to inform him he would put the note in suit; Davis requested him to delay suit, that he might make some arrangements to pay the note himself, and the plaintiff did delay and give him and the others time till suit brought. Just before the suit was brought, David Martin, as the agent of plaintiff, presented the note to *defendant. Jones expressed great surprise that the note had not been paid long ago; said he knew Carson had such a [*78
note, but supposed it had been paid long ago. Afterwards Jones wrote to Carson, requesting him to let him know the amount of the note and the payments on it. The other defendant, Wiley Hill, said when the note was presented, that he thought it had been paid; but did not say that he knew that *Carson* had such a note, but acknowledged that he had signed a note in blank for $5000, which was delivered to William Hill.

It appeared very satisfactorily, that the note had been placed with Carson as collateral security, to cover his liability for drafts accepted on account of Davis & Hill, and that he filled it up in the absence of all the parties; and gave the defendants notice of the existence of the note just before it was sued on. During the years 1836, 1837, 1838, and 1839, Davis remitted large sums of money at different times to Carson, to enable him to meet the engagements which he had incurred on account of Hill & Davis, and on Davis' individual account. The account current presents a fair statement of the accounts; when Davis remitted the money, he gave Carson no particular instructions as to its application, but left it to Carson to apply the credits as he pleased. After striking a balance

of all the accounts between Carson & Davis, Carson states that Davis was indebted to him $3728, which sum he contended he had a right to recover against the defendants on this note He placed the credits to the general accounts as he received the money, without regard to any specific demand. At the end of the year 1836, or rather on the first of March, 1837, the balance against Davis was $4784 73 cents. In January, 1838, the balance was $2669; and in 1839, January, the balance was $3728. The accounts will explain themselves. There are two items in them which deserve particular notice. One is a note of Davis & Hill, for $3000, indorsed by Elijah Carson, discounted in the Bank of South Carolina, on the 15th September, 1836 Nett amount after discount, $2959. The other was a note of Davis & Hill, for $3219, discount taken off, $3184, indorsed by James S. Rogers first, and Elijah Carson, dated March 18th, 1837, and payable to the Planters' and Mechanics' Bank. Those two notes were sent down by Davis, from Laurens, and were endorsed for the *79] *accommodation* of Davis & Hill Carson credited at the time above stated, these sums to Davis; but when they became due, he paid the renewals himself, and entered the sums thus paid to the debit of Davis. Carson then paid off entirely the note to the Bank of South Carolina; so that the amount of it stands both on the debit and credit side of the account, swelling both, but making little difference, ultimately, as to the balance. The note to the Planters' and Mechanics' Bank was paid off at different times of its renewal, to about $1100. This last sum Carson does not charge against the defendants, but against Rogers, the first endorser. The sums actually paid by him are entered in the account; he charged to the defendants, for whose accommodation the note was executed.

There are other facts which may be regarded as connected with the justice of this case, which perhaps should be stated. In the spring of 1836, after his return from Charleston, Wm. Hill went to Mississippi, as it was supposed to speculate in lands. In the fall of 1837 he left this State and went to Mississippi, where he has remained ever since. After Hill left here, the stock of goods remaining at Laurens were packed up by Davis and sent to Mobile for Hill, by the way of Charleston, Carson receiving and forwarding the goods for the parties. He paid the freight and charged the amount to Davis—I think about $160. From this fact, as well as others, it was certain that he knew that Hill had removed to Mississippi.

As I have not been furnished with the grounds of appeal, I do not deem it important that I should enter particularly into the details of my charge to the jury. The jury found for the plaintiff, under my instructions, and if I was in error as to one of the many questions raised on the circuit, I am willing that defendant's counsel should avail themselves of any advantage of it. I felt great doubts as to some of the questions at the time; more particularly as to the credit of the proceeds of the note discounted in the Planters' and Mechanics' Bank, with Rogers' name as first endorser on it. I held in effect that the note was good, although it was not filled up till it got into Carson's hands—that the plaintiff had acquired a right to it, when he advanced money equal to its amount. That having no specific instructions from Davis, the plaintiff had a right

to keep the accounts and place the credits as he *might think proper. That he had not lost his right to recover on the note, by waiting with Davis, or by not giving notice to all the makers of their liability; and that the sums raised on the notes discounted, were received on accommodation paper, for the benefit of Davis & Hill; and that the money afterwards paid by plaintiff in discharge of the notes, was properly set off, on the debit sides, to the credits which had been entered. [*80

GROUNDS OF APPEAL.

1. Because his Honor charged the jury that the plaintiff was entitled to recover, notwithstanding the paper sued on was signed in blank, and filled up by the plaintiff, in the absence of all the makers, near six months after its execution, without the consent or knowledge of the defendants, and without giving notice thereof to them, until just before the commencement of the suit.

2. Because the paper sued on was signed in blank, and delivered to the plaintiff to be held as collateral security for acceptances to be made by him for Hill & Davis, and he was not authorized to fill it up as a negotiable paper and an unconditional promise to pay.

3. Because the payments made by Davis to the plaintiff should have been first applied to the discharge of the exceptances, to secure which the paper sued on was delivered to the plaintiff.

4. Because, even if the paper sued on were valid, the testimony established the payment of the whole, or the greater part thereof.

5. Because the plaintiff gave indulgence to Hill & Davis, the principals, and at the same time aided them in removing their effects from the State, without giving notice to the defendants that he held them liable for this claim.

6. Because his Honor charged the jury that the proceeds of the two notes discounted in bank, for the accommodation of Hill & Davis, should not be regarded as payments of the acceptances made by plaintiff for Hill & Davis.

7. Because the finding of the jury was contrary to law and evidence.

8. Because his Honor charged the jury that the note sued on could not be regarded as a guaranty.

**Curia, per* BUTLER, J. The two first grounds present the same question, to wit: was the note void because it was left with Carson in blank, and filled up by him in the absence of the other parties to it? Carson acquired his possession, control and right to the note from William Hill, who was acting not alone by derivative authority from others, but on his own account as one of the principals to the note. He had full authority to use the paper as he might think proper. The note was taken and filled up by Hill's express authority and direction, and in good faith, for the purpose agreed on between himself and Carson. The latter had the assent of one of the principals to fill up the blank, as fully as an endorsee has the authority of his endorser to fill up the terms of endorsement above his name; which was nothing more than making the note payable to and negotiable by himself for the amount specified by all the makers. The next question that arises is, what right did Carson acquire to the note upon or after its delivery? Until he accepted drafts to the amount of it, he had no right to or control over it, but it was subject to the demand of the depositor. But after Carson had incurred a liability to the amount of $7500 for Hill & Davis, by accepting the drafts for that sum, he acquired as perfect a right to the note as if he had bought it, and the defendants had as little control over it as if they had given it absolutely for goods sold and delivered. From that time Carson's title [*81

could not be divested, nor the defendant's liability discharged, without payment. The pledge, or collateral security, (call it what you may,) had become forfeited, and could only be redeemed by the payment of money equal to its amount. So far as regarded the payee, all the makers were principals; although as between themselves, Jones & Wiley Hill were securities of the other two. This relation between the makers could not affect their liability to Carson. The note could not therefore be regarded in the light of a guaranty requiring notice, as contended for by the counsel. Or if so, it would be an absolute guaranty for the payment of so much money, which would impose the same obligation as any other unconditional engagement to pay money. I think this general principle well stated in the case of *Norton* vs. *Eastman*, (4 Greenleaf, 521,) in which it was said by the Judge who delivered the judgment of the Court,

*82] "it seems to be well settled that where a guaranty is *absolute in its terms, and definite as to its amount and extent, in such case no notice to the guarantor is necessary; the very act of the party in giving the guaranty is inseparably connected with the knowledge of its nature and limits."(a) Only where the party cannot know before hand whether he is to be ultimately liable or not, nor to what extent, is it necessary, in order to charge him, that he should have reasonable notice. Here Jones and Wiley Hill gave William Hill power to make them absolutely liable for $5000, without condition or limitation. By the understanding of the parties, they were to be equally liable, and to the same extent as Hill & Davis. After signing the paper, their ultimate liability was fixed, and they should have guarded themselves by their own vigilance, and not have relied on notice from Carson, who had given credit on an unqualified obligation to pay him, should the drafts not be paid.

Having come to the conclusion that the note was a valid obligation, and that the defendants were liable to pay, according to the terms of the paper, after it was filled up, the remaining questions arise out of the application and the extent of the credits which should have been made by Carson, and to which the defendants were entitled, by the sums of money remitted by Davis, and raised by Carson on the notes discounted in the banks. If the money remitted in cash by Davis from Laurens, had been applied to this note, or to the drafts accepted on its faith, then the defendants would have been entirely discharged. Davis & Hill, and Davis alone, owed, beyond the amount of this note, large sums, for which the plaintiff, Carson, had no security. He had paid and advanced money on their individual responsibility. From the manner in which he kept the accounts, he applied the money received from Davis to the payment of these latter demands. Or rather, that is the result—for he did not apply the payments to the extinguishment of the specific demand covered by the note. The law seems to be clear and indisputable, that where the debtor does not direct the application of money paid, to any particular demand, where there are two or more, the creditor who receives the money may make his own applic tion. When Davis remitted money he gave no particular direction about it; but, perhaps, believing he could pay all

*83] demands against him, he left it to Carson to make the *application of the credits as he might think proper. Carson consulted his interest,

(a) See *Lawton* vs. *Maner*, 9 Rich. 337. *An.*

and applied the payments to the more insecure debt. And this we think he had a right to do according to law, if he acted in good faith and without frand or collusion with Davis, of which there was not even a suspicion. Allowing this to be so, still the defendants insist that they ought not to be debited with the sums subsequently paid into the banks by Carson, after he had received and given Davis credit for them. That is, the credit when once made, was absolute and beyond Carson's control. And that when he paid the money into bank, after protest, he could not debit the amount against the credit previously given. It is admitted that the money raised on the notes discounted, was drawn on accommodation paper for the benefit of Hill and Davis The first was endorsed by Carson alone, and there is little doubt that it was discounted in bank more on the credit of his name than those of Hill and Davis, the makers. This being the case, Carson might well have charged them with this liability at the time he gave the credit. To test it, suppose the defendants, or either of them, should have come the day after the credits were made, and demanded the note upon which this action is brought, could they have obtained it without relieving Carson from his liability to the bank? I think they could not. Justice and fair dealing would forbid it. And if they could get the note without paying the amount credited to it, and for which Carson was liable, the credit would be unavailing to them. Carson could not be divested of his title to the note until it was discharged of all its incumbrances The money, therefore, paid to the South Carolina Bank in satisfaction of the note discounted in it, may well be set off on the debit side of the account; the debit neutralizing the credit; the one being received, and the other paid, for Davis and Hill, by Carson, without benefit to him, beyond commissions. The money raised on the note endorsed by Rogers, must be regarded in the same light. [The money thus raised was not for Rogers or Carson, but for Davis and Hill; and when Carson paid the renewals he was not bound to look exclusively to Rogers for indemnity. Davis and Hill were the principals, and Rogers security, as between themselves, but all were liable to Carson; and the money when paid was for the real and ultimate benefit of the makers; and they having got credit for the *money received, [*84 they should be debited with it when paid. Allowing these items to be just debts to countervail the previous credits, the balance, as struck by Carson, was three thousand seven hundred and twenty-eight dollars, for which the jury were instructed to find their verdict with interest. And the Court is satisfied that the defendants could not, at any time, have redeemed their note without paying this sum. The verdict was therefore right, and cannot be set aside on any of the grounds noticed.

Another ground is taken, that the plaintiff gave indulgence to Hill and Davis, the principals, and at the same time aided them in removing their effects from the State, without notice to defendants. This suggests the inquiry, what indulgence did the plaintiff give, and for what purpose? The plaintiff, at the instance of one of the defendants, Davis, did forbear to sue. But he entered into no obligatory contract for forbearance. There was no contract between himself and Davis that would impose any impediment to his suing at any time that he might think proper. He gave Davis time; without any consideration or agreement, that could constitute a new and separate contract from that which arose

from the note itself. There was no promise to indulge or forbear which was binding on the creditor. The law is very clear, that the surety is bound by the terms of the contract, and cannot be discharged unless the principal varies the terms of the original contract, by enlarging the time of performance. (2 J. C. R., 559.) There was nothing to prevent Carson from suing at any time, by virtue of any agreement which he had entered into with Davis. As to receiving and forwarding the goods of Davis and Hill, he had as perfect a right to do so, as of any other customer in good credit. He certainly had no authority to stop them for any one, much less for Wiley Hill and Jones, who lived near the place from which they were transported. He acted for Hill and Davis as a mere forwarding agent, and cannot be held responsible for not interposing to attach or arrest their goods for the benefit of others.

We cannot perceive any grounds to grant a new trial. Motion refused.

RICHARDSON, O'NEAL, EVANS, and EARLE, JJ., concurred: GANTT, J., dissented.

Irby and *Young*, for the motion. *Henry* and *Wardlaw*, contra.

CASES AT LAW

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA.

Charleston, February, 1841.

JUDGES PRESENT.

HON. RICHARD GANTT,
" JOHN S. RICHARDSON,
" JOHN BOLTON O'NEALL,
HON. BAYLIS J. EARLE,
" JOSIAH J. EVANS,
" ANDREW PICKENS BUTLER.

M. J. Buckner, Ordinary, *vs.* Hugh Archer and others.

In a suit against the securities of an administrator upon their bond, where a decree of the Ordinary against the administrator is offered in evidence, it is competent for the securities to show that the administrator, at the time of the decree, had removed from this State and was resident in another; and therefore was not subject to the jurisdiction of the Court.

In such case, it is not competent for the Ordinary to make the absent administrator a party by publication in the Gazette, and the securities may show that the Ordinary proceeded in that form, although the decree recites that the administrator was duly cited and made default. Such recital is not conclusive. See *Lesterjette*, Ordinary, vs. *The Ex'rs. of Ford*, in note.

Before Gantt, J., at Beaufort, Spring Term, 1837.

This was an action of debt on an administration bond, against the securities of Archer, the administrator. A decree of the ordinary against him was offered in evidence. The defendants proposed to prove that at the time of the proceeding before the ordinary, Archer had removed from the State and was resident in Florida; and that, in fact, the ordinary had attempted to make him a party by publication in the *gazette. But, inasmuch as the decree recited that the administrator had [*86 been duly cited, and made default, his Honor overruled the evidence, and the plaintiff obtained a verdict, which it was now moved, on the part of the defendants, to set aside, and for a new trial.

Curia, per Earle, J. It is essential to the validity of a judgment, that the Court should have jurisdiction of the person and of the subject matter. When such is the fact, the judgment is conclusive, between the same parties, and those in privity with them, upon all the matters in

controversy, which it purports to have decided. But I apprehend the want of jurisdiction may be set up against a judgment, whenever it is
*87] *attempted to be enforced, as a new and substantive cause of action, or where a benefit is otherwise incidentally claimed under it. This is a fundamental principle, and pervades the jurisprudence of all civilized countries.

Nothing could be conceived more tyrannical and unjust, than to hold a man conclusively bound by a judgment recovered in a suit of which he had no notice, and in a court to whose jurisdiction he was not subject. Such a judgment cannot be rendered available for any purpose. This principle is well settled in the United States, in regard to judgments ob-
*88] tained in one State, when sought to be enforced by suit in the *courts of another. And it has been held by the most enlightened courts we have, that such judgments may always be impeached and invalidated, by showing that the defendant was not subject to the jurisdiction which rendered the judgment, and had no such notice of the suit as to be legally a party thereto; *Borden* vs. *Fitch*, (15 John., 121; *Bessell* vs. *Briggs*, 9 Mass. T. R., 462; *Miller* vs. *Miller*, 1 Bail. Rep., 242,) and the same point has been ruled in the King's Bench, in regard to a judgment recovered in the island of Tobago. (9 East. 191.) If the want of jurisdiction appear on the face of the proceedings, there can be no doubt that the courts of the State in which the judgment was rendered, would them-
*89] selves regard it *as a nullity, when attempted to be enforced in a subsequent action. Such was the case of *Lesterjette, Ordinary,* vs. *The Ex'rs. of Ford,*(*a*) decided at Columbia, Fall Term, 1831; where

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(*a*) C. B. LESTERJETTE, ORDINARY, *vs.* THE EX'RS. OF ELIJAH FORD.

Where there is only one defendant in a suit in Equity, who has removed from the State, and has no property there, he cannot be made a party, by publication in the gazette.

A decree pronounced against an absent administrator, thus attempted to be made a party, is a nullity, and will not sustain an action at Law against the sureties.

Before EARLE, J., at Barnwell, Fall Term, 1831.

"Nathan Grimes, deceased, made a will by which he bequeathed certain slaves to his widow for life; to be then sold, and the proceeds to be equally divided among his seven children.

Isaac Grimes and William Grimes took out letters of administration with the will annexed, and gave bond according to law. Elijah Ford, the defendant's testator, was one of their securities.

John Grimes the elder was one of the seven children of Nathan Grimes, and was entitled under the will to a portion after the death of his mother. He died intestate, leaving a widow, Mary, who afterwards intermarried with one Pitman, and one son, John Grimes the younger, *his only heir at law,* for whose benefit this action was brought. There was no administration on the estate of John Grimes the elder.

The pleas were *non est factum* and performance. Replication assigning a breach that the administrator did not pay over to John Grimes the elder, his distributive share of the estate of Nathan Grimes the testator. Rejoinder and issue.

The plaintiffs, to sustain their action, produced the will of Nathan Grimes; the return of sales by the administrators to the ordinary; and finally, a bill and other proceedings in the Court of Equity, at the suit of the plaintiff against William Grimes, surviving administrator; Isaac Grimes having departed this life.

In the bill the plaintiffs style themselvss "your orator and oratrix, John Grimes,

it was held that a surviving administrator and sole defendant, who was absent from the State, and had no property within it, could not be made a party to a suit in Equity by publication in the newspapers, so as to

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the younger son of John Grimes the elder, deceased, and Mary Pitman, widow of said John Grimes the elder, who hath since intermarried," &c.

It appeared by the proceedings, and was admitted, that William Grimes, the surviving administrator and defendant, was made a party to the suit in equity by publication in the newspaper, having removed without the limits of the State.

A report was made by the Commissioner, 3d February, 1824, in favor of complainants, for $729, and was confirmed the 4th February, 1824. A motion was made for a non-suit, and was sustained by the Court. The principal ground taken, and the only one relied on by the Court was, that William Grimes not being a citizen of South Carolina, not being found within its limits, and having no property there, could not be made a party to a suit in Equity where he was the sole defendant, by publication in the gazette, so as to give that Court jurisdiction over him; therefore, the decree pronounced against him, and produced in evidence to charge his securities, was a nullity. The plaintiffs, by introducing the decree, made the whole record evidence, so as to authorize the Court to look through the proceedings to see if there was want of jurisdiction, or any other substantial defect, to avoid the decree. The plaintiffs relied on the Act of 1784,(*a*) (1 Brev. Dig. 203.) On a strict construction of that Act, it may well be doubted whether it was intended to apply to such a case as this; a case where there was only one defendant, and he absent, residing and being in another State, and having no property in this. I incline to think it was intended for those cases where several defendants are sued jointly, in relation to some property or right in which there is a joint interest. The property remaining in this State, and some one or more of the parties (defendants) in interest being here and served with process. "If in any suit in the said Court, a defendant against whom," &c., not *the* defendant; leading rather to the conclusion that it was meant for a case where one of several defendants could not be served. But suppose the decree would be valid against William Grimes, and could be enforced against him if he were to return; it does not follow that it is binding on his securities, not parties to the suit, or that it can be enforced against them. Another clause of the same Act provides, in relation to the same subject, that such absent defendant may appear within two years and claim a re-hearing; but that in case neither he nor his legal representative shall do so, "the decree shall stand absolutely confirmed *against such person, his legal representative*, and all claiming under him." Now, the securities do not stand in either of these latter relations to William Grimes; and the last phrase, "all claiming under him," seems to point exclusively to cases where some right or claim to property within the state is the subject of adjudication. It is worthy of remark, too, that the Act of 1808,(*b*) regulating the proceedings in the Court of Equity, and prescribing the mode of serving process, and bringing in parties, (1 Brev. Dig., 211,) contains no such provision; and it may well be questioned whether the Act under consideration is not repugnant to the latter Act, and repealed by the general repealing clause, page 212.

This question is briefly touched on, and perhaps decided by Chancellor De Saussure, in *Wistanly* vs. *Savage*, (2 McC. C. R., 435.) in which he says, "It is very certain that non-residents cannot be made amenable to suits in this Court, unless they have property in the State;" and cites 1 Atk. 19; and he considers the Act of 1784 as intended to regulate proceedings in cases where non-residents could be made amenable, by holding property within the State, which would give jurisdiction, both at Law and in Equity: at Law by attachment, and in Equity by the publication of notice under that Act. The decree in this case would hardly be enforced against William Grimes by the Courts of the State where he resides, as the *judgment* of a Court of compent jurisdiction; as I apprehend neither the Courts of this State, nor any other, would enforce a *judgment*, (as such and therefore

(*a*) 7 Stat. 210, § 12, 13. *An.* (*b*) 7 Stat. 306.

*90] enable the Court to pronounce a *binding decree. In a suit against the executors of the security, on the administration bond, such a decree was declared to be a nullity.

The only difficulty in this case arises from the recital in the decree of the ordinary, that Archer had been cited and made default; and we are supposed to be concluded on the question now before us, by the case of

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conclusive.) obtained by process of attachment against a citizen in another State, where he did not reside. The plaintiffs moved to sustain the non-suit.

Curia, per O'NEALL, J. The Act of 1784, (P. L. 388,) was intended to give the Court of Equity jurisdiction over defendants residing out of the State, in three classes of cases: 1st, where there might be other defendants residing in the State; 2d, where the subject matter of litigation was within the State; and 3d, where the defendant had property within the State, which could not otherwise be made liable to the complainant in Equity. It is, however, manifest in the two last of these cases, that the decree can have operation only on the matter in dispute or the property of the defendant, and is only a decree conclusive against him and those claiming under him, as to the matter in dispute, or the property made liable to the decree. Beyond this, I apprehend, the decree can have no effect. For as to the defendant himself, so long as he remains beyond the jurisdiction of this Court, it cannot be enforced by any action on it in another State. In the first case the decree may operate to conclude not only the defendants, but also in some cases his privies in law. If two administer on an estate, and one goes out of the State, and a bill is filed against the one in the State, and the other out of it, for an account, and a decree is obtained against them; in such a case, I should think the decree evidence to charge the securities to the administration bond. The securities undertake for the administration of both, and if one is within the jurisdiction, the other must be joined, and hence the Court having obtained jurisdiction by having one of the parties actually before them, and the other constructively, the decree is conclusive against the administrator in Court, and of necessity must be against the securities.

In a case decided in Charleston, at our session in February last, ——— it was held that the circumstance of the fund in dispute being within the jurisdiction of the Court, gave it jurisdiction, notwithstanding the defendants were without the State.

In the case of *Miller* vs. *Miller*,(*a*) decided Spring Term, 1829, at Columbia, it was held that no action could be maintained on a decree obtained by publication in North Carolina against defendants residing in this State. I hence conclude that where a decree is obtained against a sole defendant, residing out of the State, it must act upon the subject matter in dispute, or upon the defendant's property in the State, which is decreed to be liable to the satisfaction of the complainant's equitable demand. For any other purposes, it can have no effect. For, divested of these, the Court of Equity of this State has no jurisdiction over a defendant residing out of it. The decree offered in evidence in this case, was clearly pronounced against a party not in Court, and over whom the Court had no jurisdiction, and is therefore void.

The supposed hardship of the case does not in reality exist. Where a sole administrator is absent from the State, that circumstance will give the Court of Equity jurisdiction to entertain a bill for an account against him and his securities. See *Cole* vs. *Cole*, decided at Columbia. The parties here have therefore no difficulty in obtaining their rights, if they will pursue the proper course.

The motion to set aside the non-suit is refused.

JOHNSON, J., concurred: HARPER, J., absent.

(*a*) 1 Bail. 242. *An.*

See *Menlove* vs. *Oakes*, 2 McMul. 162. *An.*

Lyles, Ordinary, vs. *Robinson*, (1 Bail. Rep. 25.) In that case the administrator himself being sued at law, pleaded that the decree of the ordinary had been rendered against without his having been duly cited or in any manner made a party. But it was held that such defence could not avail, and that the decree of the ordinary was conclusive.

Mr. Justice Nott says, "when a decree is pronounced, either in a Court of Ordinary, or in a Court of Equity, an action may be maintained on the bond, against the administrator or his sureties, to recover the amount so decreed to be due; and whether the decree be correct or not, cannot be tried in this collateral way. It must be conclusive of what it purports to decide." Now, how far the fact that the party was cited, was a point decided by the decree, may be well questioned. That was not the point in issue; it was not the subject matter of the proceeding, which was instituted only to ascertain the amount of the administrator's indebtedness. But a material distinction between that case and this is, that there the administrator himself was alone sued; and being permanently resident, and therefore admitting himself to have been subject to the jurisdiction, he claimed to avoid the decree by denying the truth of the recital.

It is not pretended that the ordinary can, by publication in the gazzette, make one a party to a proceeding before him, who has removed from the State, and is a resident citizen of another. If he had recited that sort of notice in the decree, it would not have been regarded as conclusive, even against the administrator. Shall it be contended that by reciting merely that the administrator was duly cited, the ordinary can make his decree conclusive evidence against the sureties? Upon the whole current of American cases, if this decree were attempted to be enforced against Archer in the State where he resides, he might avail himself of the want of jurisdiction, as a defence. It was held in *Lesterjette* vs. *Ex'rs of Ford*, that *the decree could not be enforced against the absent administrator in another State. When the case [*91 of *Lyles* vs. *Robinson* was decided, the general understanding of the profession was, that the decree of the ordinary was equally effectual against the securities, as the administrator.

In the case of the *Ordinary* vs. *Condy*, (2 Hill R., 313,) (*a*) that subject underwent the elaborate examination of the Court; and on mature consideration it was held, that the sureties do not stand in that relation of of privity to the administrator, which makes a decree against him, conclusive against them; that such decree is only *prima facie* evidence of the amount due; and that the sureties, when sued upon the bond, may prove that the decree was rendered for a larger amount than was due and owing; as, for instance, in that case, that the decree embraced an individual debt of the administrator for which the sureties were not liable. Being held as only *prima facie* evidence, such decree is put upon the footing of foreign judgment, of which, on the authorities cited, the validity may be impeached for want of jurisdiction. And upon the whole reasoning in the *Ordinary* vs. *Condy*, if the surety may controvert the

(*a*) See *Norton* vs. *Wallace*, 1 Rich. 507, 2 Rich. 461. *Davant* vs. *Webb*, 2 Rich. 385. Dud. 27. Post 101, 250.

decree against the administrator, where he has been regularly and duly cited, on the very point which it is intended to ascertain and make certain, *a fortiori*, he should be allowed to prove that the admiuistrator, in fact, was not a citizen of the State, but had removed so as to be no longer subject to the jurisdiction. How far such proof will render the decree a nullity, and wholly inoperative against the sureties, we will not now undertake to decide.

The motion is graned.

O'Neall, Evans, and Butler, JJ., concurred: Richardson and Gantt, JJ., dissented.

Hutson and *Bellinger*, for the motion.

See also 5 Rich. 85. 4 Rich. 120, 278. Act of 1839. 11 Stat. 40, provides for the case of an absent administrator. *An.*

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*92] *F. Day *vs.* F. A. Becher.

Where goods have been levied on by a Sheriff, under executions in his hands, and before they are sold, a writ of foreign attachment against the same defendant is lodged in his office, he may levy the attachment also on the goods; and this is not such a case, where the property or fund is protected by being in the custody of the law.

Merely lodging a writ of attachment in the Sheriff's office, is not sufficient to attach the property or fund in his hands; but the Court will permit him to accept service, even after rule and cause shown—*nunc pro tunc.*

Before O'Neall, J., at Charleston, May Term, 1840.

This was a rule against the Sheriff to show cause why he did not pay over moneys in his hands, belonging to the defendant, to the plaintiff.

He returned for cause, that he levied sundry executions on the goods of the defendant, from which they were satisfied, leaving a balance in his hands; that while the goods were in his hands, a writ of foreign attachment was lodged in his office, which was considered as accepted by him. Afterwards, the execution of the plaintiff was issued out of the City Court, and lodged in his office.

The Sheriff was allowed to enter an acceptance of the writ of attachment on the day on which it was lodged in his office.

The rule was discharged. The plaintiff appeals, on the annexed grounds.

GROUNDS OF APPEAL.

1. That the Sheriff having made a levy under executions, the whole property was in the custody of the law, and could not be attached.

2. That to attach any property in the hands of the Sheriff, it is not sufficient merely to lodge a writ of attachment in his office.

3. That though the Sheriff did acknowledge the lodgment of the writ, as notice to himself, it was not sufficient to bar the action in this case.

4. That it is necesary, in order to attach property in the hands of the Sheriff, that he should be regularly served with a copy of the attachment writ by the Coroner.

*93] 5. That his Honor erred in allowing the Sheriff, after rule and cause shown, to enter a written admission of notice, or acceptance of service.

SHERIFF'S RETURN TO THE RULE.

The Sheriff of Charleston District, in answer to the foregoing rule, says, that on the 10th and 11th days of April last, two *fi. fas.*, were lodged in his office, at the several suits of *Charles J. Bollin and Matilda Schroder* vs. *F. A. Becher*, under which he levied on and sold the stock in trade of said F. A. Becher, to an amount considerably greater than the sums due on said executions, and expenses of sale. That while the said goods were yet unsold, in his hands, to wit, on the 22d April last, a writ of foreign attachment was lodged in his office, at the suit of *James A. Bowie* vs. the said *F. A. Becher*, for an amount more than sufficient to exhaust the balance of the proceeds of sale in his hands. That on the 14th day of May last, a *fi. fa.* was lodged in the Office of the Sheriff of the City Court, at the suit of *Fisher Day*, against the said *F. A. Becher*, and notice of the same was served on the respondent. That on the 19th day of May last, a *fi. fa.* was lodged in respondent's office at the suit of the said *James A. Bowie* vs. the said *F. A. Becher*, on the attachment writ aforesaid, and respondent has been required to pay over the balance in his hands to the attaching creditor aforesaid; and under these circumstances he prays judgment of the Court as to the disposition over of the fund in his hands. Respondent further answers, that there being no Coroner in the district, a day or two after the lodgment of the attachment, plaintiff's counsel consulted respondent as to the acknowledgment of the service of the attachment by him as a garnishee, and respondent replied he deemed it unnecessary, as he considered the lodgment of the writ sufficient notice. Respondent further answers, that the sale of the goods being for a greater amount than the executions called for, was made by consent of all parties, including the defendant, and the attaching creditor.

ALEXANDER H. BROWN, S. C. D.

Walker, for the motion, said that to attach the funds of an absent debtor, the garnishee must be served. He cited P. L. *369, 9th sec. The Sheriff must be served by the Coroner. (2 Brev. Dig. 86.) [*94

Yeadon, contra, submitted the case without argument.

Curia, per O'NEALL, J. In this case it ought to be kept constantly in mind, that when the writ of attachment was lodged in the Sheriff's office, the goods of the defendant were in his hands in specie. He had previously seized them in execution; but still he might have levied the attachment, and this would have constituted no conflict between the two processes. The levy of the attachment would have been a junior lien, and could only have created a claim for what might have been left after satisfying the precedent levy. This is not a case where the property or fund is protected by being in the custody of the law. So too, the Sheriff being in the possession of the goods of the absent debtor, was properly the garnishee.

For he is not within the exception which in one case exempts him from being made a garnishee. In Serg't. on Att. 89,(*a*) it is said that a Sheriff cannot be made a garnishee in respect to money raised on a *fi. fa.* This is the only exception, and in all other cases he is like any ether person, liable to be summoned. In this case he had the defendant's goods, and now has the defendant's money, left after satisfying the elder execution. Service upon him would have been a levy upon the goods. He might accept the service, and thus make it effectual. He said in his return, that he was applied to to acknowledge service, and that he said he thought it unnecessary, as he considered the lodgment of the writ sufficient notice. The party plaintiff in attachment ought not to be pre-

(*a*) See *Blair* vs. *Cantly*, 2 Sp. 34. 1 Strob. 244 2 Sp. 389. *An.*

judiced by an ommission of the officer of the law, which the Court could remedy by amendment.

This is often done in the amendment of returns of service of writs, of levies on *fi. fas.* and generally in all cases where it is a mere clerical omission or mistake. This practice was pursued in this case, and by doing it the record is perfect, and the prior lien of the attaching creditor is preserved.

The motion is dismissed.

The whole court concurred.

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*95] *MOSES D. HYAMS *vs.* JOHN BOYCE, JR.

The custom of postponing the payment of the Clerk's costs, until the termination of the suit, will be adhered to, as indicating the proper construction of the "*fee bill*" of 1839, p. 8.

Before RICHARDSON, J., at Charleston, January Term, 1841.

This case came up upon the following rule against the Clerk of the Court of Charleston District:

On motion of *Kunhardt & Pringle*, plaintiff's attorneys, it is ordered that C. C. Strohecker, Esq., Clerk of the Court of Common Pleas, do show cause on Saturday, the 30th inst., at 10 o'clock, A. M., why he refuses to deliver to the plaintiff's attorneys, the writ signed by him as clerk in the same. By the Court.

(Signed) C. C. STROHECKER, C. C. P.

RETURN OF THE CLERK.

C. C. Strohecker, Clerk of the Court of General Sessions and Common Pleas, for Charleston District, upon whom the above rule has been served, to show cause why he delivers to the plaintiff's attorneys the writ signed by him, as Clerk in the said action, for cause showeth, that by the present fee bill of 1839, and under the law in relation to the fees of the Clerks of the respective Circuit Courts of Common Pleas and General Sessions in this State, the said fees are of right demandable and payable upon the performance of the specific service rendered, from the party at whose request, or for whom the service was rendered. That in the absence of any special contract, the law raises a promise on the part of the person at whose request the Clerk renders any specific service, chargeable in the fee bill, to pay the fee allowed by law *presently*, as in all cases of implied contracts; and that in the event of such service being demanded, the respondent is not bound to render the same, unless the fee allowed by law is tendered; and, as in this case, upon signing a writ, the respondent has a legal right to withhold the same from the party until the fee for such service is tendered. This view of the legal rights of the respondent is submitted as according best with the general principles of the law on the subject of the costs of actions at law, in which the party, plaintiff or
*96] defendant, does *actually recover from the losing party, the expenses to which he has been put in the prosecution or defence of the action. And the recognition of the *legal right* of the Clerk to require his fees to be paid when the service is rendered, is believed to be essential to the proper discharge of the duties of the office, and the preservation of proper order and economy in the management of the business of the same, as well as furnishing the only means by which the clerk can realize his payment for his services which the law intended him to receive. The respondent, in the exercise of this right, does not intend to introduce any new rule or practice which may work any inconvenience to parties, but the right being recognized, will so act upon it, that while he may feel himself willing to keep

accounts with the practitioners at the bar, as formerly, he may, if he find necessary, and as he may find it advisible, refuse to give long credits for his services, and claim payment for the same when rendered.

C. C. STROHECKER,
C. G. S. & C. C. P.

On hearing the rule and the return, his Honor, Judge RICHARDSON, ordered the rule to be made absolute.

An appeal made from his Honor's decision, on the ground that the same is contrary to law.

Rice, for the motion, cited A. A. 1791, (1 Faust, 3,) fees of office are established p. 22, (2 Faust, 33.) A. A. 1827, fee bill, p. 55. A. A. 1839, p. 14, (Bac. Ab. tit. costs.)

Kunhardt, contra, contended that neither the plaintiff nor his attorney had the right to collect Sheriff's and Clerk's costs; cited McC. 25. Costs abide the determination of the action.—*Ib.* 25. The clerk cannot recover his costs against the plaintiff, unless the defendant be insolvent, or the plaintiff has collected them. The law, he contended, never would have given the Clerk the right of issuing execution for costs if they had contemplated he had any other remedy.

Grimke, in reply, cited 7 Cranch, 276—each party is liable to the Clerk for his fees, no matter who recovers, "*pr. Ch. J. *Marshall*," A. A. 1839, p. 16, Clerk's right to retain. 2 Stran. 1126; 8 Mod. 226-307—2 P. W. 460. [*97

Curia, per RICHARDSON, J. The question is, has the Clerk of the Court of Common Pleas, before he delivers the writ necessary for the commencement of an action at law, the authority to require of the suitor the costs allowed by the Fee Bill of 1839? The demand is small. But the decision of the case may have important circumstances. It involves the right of litigants, and it may affect the principles of judicial justice. The fee bill of 1791,(*a*) the raised fee bill of 1827, and that of 1839, under which last the question before the Court is made, all allow the costs to the Clerk, in the same language as they are allowed to some other officers: as the Registers, Ordinaries, Sheriffs, &c. But custom has obtained, at least since the fee bill of 1791,(*b*) to tax and allow the costs of the Clerk, together with what are called the Court charges, at the termination or dismissal of a suit, and not before.

In the case of *Corrie* vs. *Fits & Givens*, (3 McC. 25,) this custom is alluded to, and as far as it can have influence, the Judge justifies it under the fee bill of 1791. That case decided that the Clerk can require payment of his costs of the plaintiff, who has obtained judgment, only in case of the insolvency of the defendant. Now, if the Clerk had the right in the first instance to call on the plaintiff, for his successive fees, he surely could not have lost the right by the defendant's being condemned to restore the fees that the plaintiff is supposed by the judgment to have paid. The converse would have been the conclusion.

I decided that case on the circuit, and have now an opportunity of adding my own reasons to those of the late Court of Errors in support of that decision, as well as in favor of the present. In that case it is incidentally stated, that in England the plaintiff pays the Clerk's costs at the successive stages of the case. "But here the costs abide the determination of the case." If this had been the precise point for the decision

(*a*) 5 Stat. 154. 4 Stat. 333. 12 Stat. 8. (*b*) 1840, 11 Stat. 6. *An.*

of the Court, it would have concluded the present question, at least under the fee bill of 1791 The fee bill of 1839 allows the Clerk for "signing writ," and all incidental services before filing declaration, "fifty cents." But is he entitled to the money upon signing the writ? or must he abide
*98] *the determination of the suit, and look in the first instance to the party against whom the costs may be ordered, according to former practice? As a general rule, officers are entitled to their costs as they do successive official acts. But, is there not good reason for the custom of making the Clerk of the Court an exception to this rule?

Before the constitution of 1791, the Judges also received costs, and were paid for their services in that way. But as far as I have understood, their costs, too, abided the determination of suits. And I think the reason and principle of practice may be seen by referring to the origin of costs, and the principles of judicial justice. At common law no costs were allowed in courts of Justice The plaintiff who lost his suit might be fined, *pro falso clamore*, "or judged in *misericordia*," according to the justice or injustice of his case. And perhaps an unjust defendant punished in the same way, or by increased damages. But such fine or damages necessarily abide the determination of every suit. In process of time, costs were given to the officers of the Court in lieu of such fines, which formerly went to the King. And is there as not good reason that they too shall abide the event of the suit, and fall only, or at least in the first instance, upon the plaintiff, who made a false clamor, or the defendant, who set up an unjust defence? If otherwise, would we not lose sight of the proper rights of parties claiming justice at the hands of the Judges?

It is one of the first principles of Courts of Justice, that all parties shall be heard without obstacle, expense, or delay. The poor and the weak absolutely require such principles for protection, and they must be awarded to all alike. But if at every step of a case, the plaintiff shall be obliged to pay costs to ministerial officers before he can reach the ear of the Judge, may we not occlude the Courts of Justice, at least to some persons? A writ is the judicial notice to a debtor that his creditor demands justice. The declaration is the precise statement of the demand. To this the debtor responds; and the issue is made up for the decision of the Court. Such are the legal forms through which we demand to be heard, and have justice judicially administered; and costs may be very justly required after and according to the decision. But any hindrance, in any step, to the judicial hearing, would be as a lien to our system of justice;
*99] as to impede a petition to the *Legislature for a right, or to the Governor for mercy. They all stand upon the same principle—the right to have a hearing and decision of the case presented. Such principles of judicial justice are summed up in Magna Charta. "*Nulli negabimus, nulli vendemus, nulli deferemus justiciam.*" And these words, so full of history and meaning, suggest to the mind the whole additional argument I would offer in support of the custom of postponing the payment of the costs to the determination of suits. The argument on the other side is, that fees or costs being allowed by the Act, they ought to be paid as the services are rendered. But laws are to be construed by their subject matter, which includes the moral and legal principles that necessarily belong to the subject.

The Court therefore think that the custom of postponing the payment of the Clerk's costs, which has obtained for fifty years, under the former fee bills, should be adhered to, as indicating the proper construction of the new fee bill, which, let it be observed, must have been passed under a full knowledge of such customary and habitual construction of all the former fee bills; and a custom so long and so closely connected with the subject of the new enactment of 1839, can scarcely be considered otherwise than as a part of the subject matter itself, and would have naturally called for positive expression if it had been intended to change the custom.

The Circuit decision is therefore affirmed, and the motion dismissed.

The whole Court concurred.

THE ORDINARY *vs.* HANNAH CARLILE. [*100
THE SAME *vs.* P. DURANT.

A decree in the Court of Equity against an administrator, with the return of "*nulla bona*" on the *fi. fa.*, (issued on the decree,) is "*prima facie*" evidence against the surety on the administration bond; and it is not necessary after such proceedings to have a decree of the Court of Ordinary before commencing actions on the bond.

A surety of an administratrix, (whose intestate was the administratrix of an estate in her life time,) is not absolutely bound by a decree in the Court of Equity against his principal, for the *derastavit* committed on the estate of which his principal's intestate was the administratrix, where he was not made a party to the proceedings; and he is not concluded from showing that his principal received nothing of the assets with which she is charged.

Before RICHARDSON, J., at Charleston, January Term, 1841.

These were actions of debt on the administration bond of one of the defendants, Hannah Carlile, as administratrix of Jane Radford, deceased, the one being against her as principal, and the other against Paul Durant, as her security. The plaintiff produced, first, the administration bond—then the proceedings in a case in Equity, at the suit of Wm. B. Campbell, administrator, *de bonis non*, of John J. Radford, deceased, the real plaintiff in these suits against the defendant, as administratrix of Jane Radford, who was in her life time, administratrix of said John J. Radford. These proceedings consisted of a bill ordered *pro confesso*—an order of reference—a report of the commissioner, and a decree against the defendant for the sum of $205 38, with interest from 23d June, 1837. The plaintiffs then produced a *fi. fa.* issued in pursuance of said decree, and returned *nulla bona*. These proceedings speak for themselves. The defendant moved for nonsuits, on the ground that no citation had been issued against the defendant, Hannah Carlile, calling on her to account before the Ordinary for the estate of Jane Radford, deceased, the intestate of the defendant, and no decree against her for any assets of the estate of Jane Radford, which had come to her hands to be administered. I thought such a proceeding essential before action brought on the administration bond, and that the decree in Equity, produced by the

plaintiff, with the return of *nulla bona*, without a decree from the Ordi-
*101] nary, or the Court *of Equity, as to the assets of Jane Radford, deceased, did not constitute proper legal proof of a *devastavit* by the defendant Hannah Carlile, and granted the motion for a nonsuit. I received the annexed notice of appeal, which, with the proceedings in Equity, will sufficiently explain the case to the Court of Appeals.

GROUNDS OF APPEAL.

1. That the decree in Equity, produced in these cases obtained by the plaintiff against the defendant, Hannah Carlile, as administratrix, with the *fi. fa.* returned *nulla bona*, was evidence of a *devastavit*, to charge the administratrix and her surety, the other defendant.

2. That there being a decree in Equity against the administratrix to pay, she having failed to account, it was not incumbent on the plaintiff to call the defendant, the administratrix, to account before the Ordinary, previous to an action on the administration bond.

3. That the decision of his Honor was in other respects, against the law of the case arising on the facts proved.

Curia, per BUTLER, J. We are of opinion that the nonsuit ordered by the Circuit Judge should be set aside. Hannah Carlile had been duly called on to account, by a Court of competent jurisdiction. She had it in her power to account for her administration as fully in the Court of Equity, as she would have had before the Ordinary. Her liability was established by a decree which she did not oppose. Whether she could have effectually resisted it or not, is not for this Court to inquire. It is only necessary to inquire whether there was such evidence of a *devastavit*, as *prima facie*, to subject her security, Durant, to liability on the bond. By the decree it would appear that Hannah Carlile had assets for which she was liable to those having demands against her intestate, and by the return of *nulla bona* on the *fi. fa.* (issued on the decree) it would appear that she had wasted the assets that came into her hands.(*a*) This has always been regarded, as sufficient evidence of a *devastavit*, to charge the security on the administration bond. The ground was taken in argument, and it was the principal one relied on, that the securities of
*102] Jane Radford were alone liable to the present plaintiff, as she *received into her possession, and did not account in her lifetime, for the estate of John J. Radford. If Jane wasted that estate, and it could be made to appear that her administratrix, Hannah Carlile, received nothing of it, the securities of the former, and not the latter, would properly be responsible for the *devastavit*. But the bill against Hannah charges that she received the money and chattels which had been in the hands of Jane Radford, and thereby incurred a responsibility to answer for the debts and demands against her intestate. The demand of plaintiff is fairly asserted against the representative of Jane Radford, and as she has not denied it, she must abide the judgment against her.

The security, Durant, however, occupies a different position in this controversy. As he was not a party to the proceedings against his principal, he is not absolutely bound by them, but, under the decision of the *Ordinary* vs. *Condy*, (*b*) he may now show that his principal received nothing of the assets of the estate of John J. Radford, but that they were wasted by the administratrix, Jane. He is not concluded

(*a*) Post 380. *An.* (*b*) Supra 41, and notes.

by the proceedings against Hannah Carlile, but may show, on another trial, that his principal, having reached nothing, should have been amenable for nothing. This is an issue which depends on evidence, to be decided by a Court and jury. The motion to set aside the nonsuit is granted.

The whole Court concurred.

Thompson, for the motion. *Yeadon*, contra.

NOTE:—The notes of argument, and the authorities cited by the counsel, that the *Reporter* had taken, have accidentally been mislaid, and cannot be found so as to appear with this case. REPORTER.

[*ISAAC TOBIAS *vs.* JAMES WOOD. [*103

An affidavit to hold to bail, stating that the defendant was indebted to the plaintiff "in the sum of one hundred and forty-five dollars, on a note and due bill, bearing interest," was held to be a sufficient compliance with the Act, and an *exoneretur* on the bail bond was refused.

Where a party swears that the defendant is indebted to him, he swears, in a legal point of view and in legal parlance, to a present debt that is due, and not a future one.

Before O'NEALL, J., at Charleston, May Term, 1840.

In this case the plaintiff issued a writ of assumpsit against the defendant; and to hold him to bail, annexed to it the following affidavit:

"The State of South Carolina. Personally appeared before me, Isaac Tobias, who being duly sworn, maketh oath and saith that General James Wood is *indebted* to him in the sum of one hundred and forty-five dollars on a note and due bill, bearing interest, and that no part of which has been paid.

I. TOBIAS.

Sworn to before me this 4th September, 1839.

ABRAHAM MOISE.

Under this proceeding the defendant was arrested and gave bail. The defendant moved, before me, to have an *exoneretur* entered on the bail bond, "on the ground of the defectiveness of the affidavit."(*a*) The motion was overruled, for the following reasons. "The Act of 1769, (P. L. 273, 1768,) Stat. 204, § 20, M., provides that no person shall be held to bail on any writ of *capias ad respondendum* for debt, unless an affidavit shall be made and attested by some Judge or Justice of the Peace, and endorsed on or annexed to the writ, before the service thereof, *of the sum really due.*" Was the question *res integra*, as to the construction of this Act, I should say that an affidavit of the sum really due, without stating the manner in which the indebtedness arose, would be sufficient; for the difference in its phraseology from the English statute on the same subject, would justify that difference in the construction. But the cases of *Peck* and *Hood* vs. *Van Evour*, (1 N. & McC. 580, Note A,) ruled that the affidavit must not only set out the sum due, but also how it

(*a*) 1768. 7 Stat. 204, § 20. *An.*

accrued; and to that I yielded my assent in the case of *Saunders*
*104] *vs. *Hughes*,(*a*) as a means of protecting the liberty of the citizen. Does the affidavit here state both the amount due, and also the manner in which the debt accrued? I think it is manifest it does. It states that the defendant is indebted to the plaintiff in the sum of $145, on a note and due bill, bearing interest. No one can be mistaken about the manner of the indebtedness, after reading the affidavit. It was contended, with the usual ability and ingenuity of the defendant's attorney, that the affidavit was defective, inasmuch as it did not show that the notes were due. I thought, however, that when the plaintiff swore that the defendant was indebted to him, he, in a legal point of view, and in legal parlance, swore to a present and not a future debt, and that therefore there was no defect in the affidavit.

In the case of *Woodfolk* vs. *Leslie*, (2 N. & McC. 585,) the affidavit stated that the defendant was indebted to the plaintiff $360, as the assignee of a promissory note. In that case my brother Richardson, referring to *Peck & Hood* vs. *Van Evour*, and to *Sellon* and to *Tidd*, stated the rule to be "that to hold a debtor to bail, the law requires that a specific sum of money shall be charged, and the cause of action plainly set forth in the affidavit." "These indispensable requisites," said he, have been strictly complied with in the affidavit before us." Compare the affidavit in that case with the affidavit in this, and if there is any difference, it has escaped my attention. Changing the parties, Judge Richardson's decision there might be used here.

In *Lowe* vs. *Mayson*, (3 McC. 313,) the affidavits states that notes were found among the papers of Archy Mayson, deceased, by which it appears that Ramsey L. Mayson is *indebted* to the said Archy Mayson's estate, $2700.88," &c. Judge Johnson, who delivered the opinion of the Court in the case of *Peck & Hood* vs. *Van Evour*, delivered the judgment of the Court in *Lowe* vs. *Mayson*. After referring to the rule settled in *Peck & Hood* vs. *Van Evour*, he said, "the affidavit in this case sets out in general terms the manner in which the debt arose, as far as the plaintiff can be supposed to be conversant with it; and if we regard the reasons of the rule, the objects are as fully attained, as if the notes had been recited with the utmost minuteness. Neither the dates nor the number of the notes would enable the Court to judge of their
*105] legal efficacy, and if *the plaintiff has committed a perjury, the offence can as well be assigned on this affidavit, as if it had contained them, so that the whole object of the rule has been attained." Paying a due regard to that decision would, it seems to me, supersede any difficulty in this case. The affidavit there makes no other allegation that the notes were due, than that by referring to them it appeared that defendant "*is indebted*" to the said Archy Mayson's estate, &c. If any more precise allegation than that the notes were due, had been necessary, it would hardly have escaped the able counsel concerned, or the experienced Judge who decided that case. The plaintiff, as administrator, could not have asked any exception, in this behalf, in his favor, for he had the notes in his possession, and could therefore speak of them with certainty. In *Saunders* vs. *Hughes*, (2 Bail. 504,) the affidavit states that

(*a*) 2 Bail. 514. *An.*

Col. Joseph Hughes, of the firm of William & Joseph Hughes, stands justly *indebted* to the plaintiff in the sum of $936.69, *due* on a note, &c. No objection was there taken to any want of certainty in setting out that the notes were due. I have looked through all the other subsequent cases, and have referred to the excellent digest of our decided cases, prepared by the defendant's attorney, and I have not been able to find a case, or dictum, which requires an affidavit to set out more than is done in this case.

The defendant renews his motion in the Court of Appeals to have an *exoneretur* entered on the bail bond, and to reverse my decision on the ground "that the affidavit is defective in substance, inasmuch as it does not contain any allegation that the *notes were due.*"

Rice, for the motion, cited P. L. 273. Tidd's Prac. 1 vol. 144, 145. 3 Chitty's Prac. 333, 334, 335. Chitty, 331, 333, 334. Chitty on Bills, 572, 573. 2 Maul. & S. 149. 7 Faust, 173—*as to form of affidavit.* Chitty's Practice, Appen. Tidd's Append. Archbold's Forms, 8, 9. of the remedy when the affidavit is defective. 1 Tidd Prac. 164, 165. *Peck* vs. *Van Evour*, 1 N. & McC. 580. 1 Rice's Dig. 97. 3 McC. 318. 2 N. & McC. 585. 1 McC. 313. 2 Bail. 504.

Moise, contra.

**Curia, per* O'NEALL, J. In this case we are entirely satisfied with the decision below; and concur in it, for the reasons assigned by the Circuit Judge in his report to the Court. [*106

The motion is dismissed.

The whole Court concurred.

See *Kerr* vs. *Phillips*, 2 Rich. 199. *Rosenbury* vs. *McKain*, 3 Rich. 149. *An.*

SOLOMON OWENS *vs.* SAMUEL HODGES.

Where a party to a contract stipulates to perform one or more things, and in the event of non performance of any or all of them, agrees to pay a certain sum, the sum agreed to be paid will be regarded as a penalty, and not as liquidated damages.

For the non-performance of a contract, the party failing shall pay the other for any loss he may have sustained, and this loss is the measure of damages. If this loss has been ascertained by the agreement of the parties, such agreement shall be carried into effect, otherwise the jury will assess the damages from a full view of the facts and circumstances of the case.

Before EVANS, J., at Marion, Spring Term, 1840.

This was an action of debt on a bond for the performance of an award, and will be sufficiently understood from the report of his Honor, the presiding Judge, and the bond, award, and precedent agreements between the parties, copies of which are subjoined to the report:

This case depends much upon written contracts between the parties, which are herewith annexed. The facts were these: The defendant was the owner of a mill near to the plaintiff's fields. The fields were reclaimed marsh land, a part of the swamp on which the mill was erected; and in order to prevent the overflow of the fields by the water

*107] from the mill, in December, 1834, an agreement was entered into *between the parties, by which the defendant was to construct a dam, to be completed by the 1st January, 1837. The dam was not finished, and a controversy arising about it, the matter was agreed to be left to the arbitrament of Brown and Wheeler, and a bond entered into, to perform the award. By the award, the work was to be completed by the 1st January, 1839, according to the original contract; and on failure to complete it, the defendant was to pay $5000. The only alteration in the original agreement made by the award, was this extension of the time, and the hands which the defendant was to furnish to work on the dam.

The action was to recover damages for not completing the work according to the original agreement, as modified by the award. The plaintiff contended, that he was entitled to recover $5000, as stipulated damages. I did not think so. 1st. Because there were many things to be done, and it was unreasonable to suppose the parties intended that this large sum should be paid for the slightest failure to complete the same in any minute particular, according to the contract. 2d. That that sum was more than five times the value of the land, when the dam was finished.

By the award, Owens was to furnish so many hands, and Hodges so many. There was some proof that Hodges did not at all times, have as many hands at work as he was to furnish. I did not consider this as material: because, if he had finished the dam by the 1st January, 1839, there would have been no breach of his agreement. The plaintiff, Owens, having performed his part, was entitled to recover full damages for the breach on the part of defendant. The object of the parties was, the completion of the dam by the time stimulated; and Hodges was bound to furnish the necessary laborers, to do this within the time. There were various breaches assigned. Some were proved, and some not. The jury gave a verdict, I think for about four hundred dollars, from which the plaintiff appeals.

AGREEMENT OF 1834.

South Carolina, Marion District:

An agreement is hereby made, between Solomon Owens, on the one part, and Samuel Hodges, on the other part, to wit: The said Owens doth agree to furnish *108] four good hands, and *provisions and tools for said hands: the said Hodges doth agree to furnish four good hands, and two others, and provisions and tools for said hands, to cut a canal, and make a dam sufficiently strong and high to prevent said Hodges' mill water from going into said Owens' fields, from an old dam known and called David Owens' machine dam, to a point of land extending from the hill where James Alwood lived, by the upper end of Price's marsh; said canal and dam to be made by the directions of said Owens. It is also agreed upon between the parties, that the aforesaid canal and dam shall be completed on or before the first day of January, A. D. one thousand eight hundred and thirty-six. In confirmation of this, our agreement, we do hereunto set our hands and seals. December 13th, 1834.

SOLOMON OWENS, [L. S.]
SAMUEL HODGES. [L. S.]

Witnesses, { WILLIAM WILLIAMSON, LEVY LEGGETT.

Upon the due and deliberate reflection of the time given for the completion of

the within stipulated work, we mutually agree to extend the time from the first day of January, A. D. 1836, mentioned within, until the first day of January, A. D. 1837. Witness our hands, the 16th day of December, A. D. 1835.

SOLOMON OWENS,
SAMUEL HODGES.

Witnesses, { JOHN A. CHERRY, EDW. B. WHEELER.

REFERENCE AND AWARD OF 1837.

State of South Carolina, Marion District:

Know all men by these presents, that Samuel Hodges and Solomon Owens are held and firmly bound one to the other, in the sum of one thousand dollars, for the payment of which sum well and truly to be made, we, the said Hodges and Owens, bind ourselves, our heirs, executors, and administrators, and assigns, firmly by these presents, sealed with our seals, and dated the 9th day of February, A. D. 1837, if either one shall fail in the condition underwritten. The condition of the above obligation is such, that if the above bound Hodges and *Owens, their [*109
heirs, executors, administrators, and every of them, shall and do in all things, well and truly stand to, abide and perform the award, order and arbitration of William Brown and Edward B. Wheeler, arbitrators, indifferently named and selected by the said Hodges and Owens, to determine all matters and things in controversy, concerning a contract between them; provided the award of the said arbitrators be made and reduced to writing, ready to be delivered to the said parties, on or before the first Monday in March next; and if said arbitrators should disagree, they shall call in an umpire, who shall decide in writing, which shall be considered binding and final; then the above obligation to be void, else remain in full force and virtue. This the 9th February, 1837.

SAMUEL HODGES, [L. S.]
SOLOMON OWENS. [L. S.]

Witness, SILAS ROGERS.

We choose the following persons to arbitrate the matters stated in the within bond: William Brown and E. B. Wheeler. 9th February, 1837.

SOLOMON OWENS,
SAMUEL HODGES.

Witness, SILAS ROGERS.

This, the 3d day of March, 1837, we, William Brown and Edward B. Wheeler, the arbitrators chosen as above, have this day met to decide upon the matters and things submitted to us, to wit: an agreement made and entered into by Samuel Hodges and Solomon Owens, dated 13th December, 1834; a deed from Solomon Owens to Samuel Hodges, dated 13th December, 1834; also a deed from Samuel Hodges, dated 13th December, 1834. From the terms of the agreement and deeds of conveyance, above recited, we are decidedly of opinion, that the consideration, as explained by Major Legget, rendered it obligatory on Dr. Hodges to complete the canal and dam, or bank, sufficiently high and strong to protect the fields of Solomon Owens from the mill waters of said Hodges, commencing at an old dam known as David Owens' machine dam, to a point of land extending from the high hill where James Alwood lived, by the upper end of Price's marsh. The time has elapsed by which the work was to be completed. *We are further of opinion, [*110
that the said Samuel Hodges has made default in not completing the canal at the time stipulated, thereby hazarding damage to the crops of said Owens, by the overflow of the fields aforesaid. We accordingly came to the following decision: that Samuel Hodges do complete the work mentioned in said agreement, on or before the 1st day of January, 1839, (eighteen hundred and thirty-nine;) that during the time allowed for completing the said work, the said Samuel Hodges shall pay to the said Owens all damages which may occur to his fields, from the overflow of the waters aforesaid, the damages to be estimated by three disinterested persons, chosen by said Owens and Hodges; said Hodges to furnish a competent overseer to superintend the work, paying for the hire of the same; and in the event of the failure of said Hodges to complete the work within the time above

specified, *he shall pay to said Owens, or to his heirs and assigns, the sum of five thousand dollars.* We declare, also, that said Owens shall furnish four hands to said Hodges, to work on said canal, whenever said Hodges shall notify him that they are wanted: and upon the refusal of said Owens to furnish said hands to said Hodges, he shall forfeit the sum of one thousand dollars. We further decree, that said Owens shall be permitted to use the canal or bank for a fence, or any other purpose, except stopping up the channel of said canal. We further decree, that as this work, when completed, is for the purpose of draining, we consider that said Hodges is equally bound to the heirs and representatives of said Owens, as to himself now living. And we further award, that the said Solomon Owens, and the said Solomon Hodges, shall each execute a bond in the sum of ten thousand dollars, the one to the other, to stand to this, our award, and to fulfill the same. Witness our hands, the day and date above written.

EDWARD B. WHEELER.
his.
WILLIAM ✕ BROWN.
mark.

Witness, LEVY LEGGETT,

BOND ON WHICH THE ACTION IS BROUGHT.

The State of South Carolina, Marion District.

Know all men by these presents, that I, Samuel Hodges, am held and firmly bound unto Solomon Owens, in the full *and just sum of ten thousand dol-
*111] lars, to be paid to the said Solomon Owens, his certain attorney, executors, administrators and assigns, for which payment well and truly to be made and done, I bind myself, my heirs, executors and administrators, firmly by these presents, sealed with my seal, and dated the sixth day of March, A. D. eighteen hundred and thirty-seven, if the said Samuel Hodges shall fail in the performance of the condition underwritten.

The condition of the above obligation is such, that if the said Samuel Hodges shall well and truly do, perform and observe, what is enjoined in the award and arbitrament of E. B. Wheeler and William Brown, for said Samuel Hodges to do, perform and observe, as stated in the award, which award is dated the 3d day of March, A. D. 1837; then the above obligation to be void, or else to remain in full force and virtue.

SAMUEL HODGES. [L. S.]

Signed, sealed and delivered in presence of
C. W. DUDLEY.

GROUNDS OF APPEAL.

1. That his Honor misdirected the jury upon the law, in charging them that the sum of $5000, specified in the condition of the bond, was not stipulated damages, but a mere penalty.

2. That his Honor further erred in instructing the jury, that upon the proper construction of the modification of the original contract, the defendant was not bound to furnish his hands, but that the plaintiff was bound to furnish for the whole time; and that the defendant was only bound to do what the plaintiff's hands could not accomplish within that time.

3. That various breaches of the award, and more especially the breach for which the damages of $5000 were stipulated, were fully proved, and that the plaintiff was therefore entitled to recover, at least, the full amount of the damages stipulated.

Mr. Attorney Gen. *Bailey*, for the motion, said, is a specified sum in award to be considered as a penalty or as liquidated damages? He contended that it was liquidated damages; and, in support of his position, cited, 2 Bail. Rep. 293, *Allen*
*112] vs. *Brazier & Randolph*; 2 Bos. & Pul. 351, *Astley* vs. **Weldon*; also, 2 Term Rep. 32; 4 Burrows, 2228; 3 Taunt. 469; 3 Barn & Ald. 692. He argued that it was necessary to look into the intention of the parties—that the sum of $5000 was to cover the value of the land, or secure the plaintiff for the amount that it would

cost him to have the work completed. He said, the principle that the damages cannot exceed the value of the land, is a novel and erroneous one.

Harllee, contra, cited, Bac. Abr. Tit. Con. letter F.; 2 B. &. P. 354; 6 Bing. 141, 242; 6 Barn. & Cress. 216; 13 Eng. Com. L. Rep. 10 J. 57; Bac. Abr. Tit. Admrs. and Arb. letter F.; 147, 3 J. N. Y. Rep. 297. It will be considered as a penalty when several things are to be done, and a large sum is specified.

Thompson, same side, said, a contract to establish stipulated damages, ought to be strictly construed. The acts to be done were to be done by the plaintiff, as well as the defendant. The plaintiff only forfeits $1000, and by incurring it, he would make the defendant liable for $5000: cited Chitty on Con. 337; 7 Wheat. 15. He contended further, that a sum in gross, is rather to be considered as a penalty, than as stipulated damages. There is not a word in the award which would show that stipulated damages was to be paid.

The bond he alleged, was void, from uncertainty. Time, he urged, where it enters into a contract, and a certain specified sum is named, it is to be regarded as stipulated damages. *Mr. T. here referred to and commented at length on the authorities cited by his colleague, Mr. Harllee.*—REPORTER.

Bailey, in reply, said, the word penalty was frequently construed to mean liquidated damages, and hence the only way to arrive at a correct interpretation of the matter was to take the intention of the parties.

Curia, per EVANS, J. This was an action of debt on a bond, for the performance of an award. From the evidence, it appeared that the plaintiff was the owner of some reclaimed land in a swamp, on which the defendant had erected a mill. The plaintiff's land was inundated by the water discharged from the mill pond. To obviate this, an agreement *was entered into, by which the defendant agreed to construct a [*113 dam, from a place called David Owens' machine dam, to another point described in the agreement, each of the parties to furnish a certain number of hands, and the work to be executed under Owens' direction. The agreement is dated in December, 1834, and the work was to be finished by the 1st January, 1837. The work was not finished, and in February, 1837, the parties agreed to refer the matter to the arbitrament of Wheeler and Brown, and entered into a penal bond to each other, in the sum of one thousand dollars, to perform the award. In March the arbitrators made their award by which Hodges was directed to finish the work by the 1st January, 1839. Some slight modifications were made in the original contract, but none material to this case. The award concludes as follows: "And in the event of the failure of the said Hodges to complete the work within the time specified, he shall pay to the said Owens the sum of five thousand dollars," and "upon the refusal of the said Owens to furnish his hands to the said Hodges, he shall forfeit the sum of one thousand dollars;" and "we further award that the said Owens and Hodges shall each execute a bond in the sum of ten thousand dollars, the one to the other, to stand to this our award, and to fulfill the same." This bond was executed, and upon it this action was brought, setting out four breaches of the condition. 1st. That the dam was not extended to David Owens' machine dam. 2nd. That it was insufficient, it leaked and was not high enough 3rd. It was not made according to Owen's direction. 4th. Defendant did not furnish as many hands as he was bound to do according to the contract.

A great deal of evidence on the trial was given on all these points. The defendant had made a dam within the time, as he contended, accord-

ing to the contract. The plaintiff contended that if he proved a breach of the condition of the bond, he was entitled to recover the sum of five thousand dollars, as stated or assessed damages. The case was tried before me at Marion, and I charged the jury that the sum of five thousand dollars, which the arbitrators had awarded to be paid, on the failure of the defendant to finish the work within the time stated, was but a penalty, and that they should assess for the plaintiff only such damages as were equivalent to the injury which he had sustained. The verdict
114] was in conformity with the charge, and a motion has been made in this Court for a new trial, on the ground of misdirection in the particular above stated. In cases where a party to a contract stipulates for the performance of one or more things, and in the event of the non-performance, agrees to pay a certain sum, it is, in most cases, exceedingly difficult to determine whether the sum be in the nature of a penalty, or damages liquidated or ascertained by the parties. By penalty, I understand a forfeiture for non-performance. Formerly, the verdict at Law was for the penalty, and the party had no relief except in Equity. But now, under the statute, where any thing but the payment of money is to be done, the plaintiff must submit the condition of his bond, or covenant, to a jury, who are to assess the damages, at the value of the injury actually sustained. In cases where damages are said to be liquidated, the province of the jury to inquire and assess, has been superseded by the parties, who had themselves ascertained and assessed the damages. To distinguish between these two classes of cases, has always been found exceedingly difficult, and I do not find, in looking through the cases, that any clear and definite line can be drawn between them. In most of the cases, as in *Allen* vs. *Brazer, et al.*, and in *Lowe* vs. *Pierce*, (2 Bail. 293; 4 Bur. 2225,) where a single act was to be done, as the delivery of a negro, or to pay so much if the defendant married any other than the plaintiff, the sum has been regarded as damages assessed by the parties; yet this cannot be laid down as an inflexible rule, for it will readily occur to every one that if, in the case of *Allen* vs. *Brazer*, the sum to be paid if the negro was not delivered, had been one thousand dollars instead of one hundred dollars, such sum must be construed a penalty. So, also, in most of all the cases where several things are to be done, and for the non-performance of any or all of them, a certain sum was to be paid, the sum of money has been regarded as a penalty. Such is the case of *Astley* vs. *Weldon*, (2 Bos. & Pul. 346,) where the defendant had stipulated to perform at the plaintiff's theatre—to attend rehearsals, &c., and in default to pay two hundred pounds. The same principle has been held in a great variety of cases, both English and American, which are to be found collected in Comyn on Contracts, 38, 47. Such a contract as that we are now considering, is to be interpreted like every other; and in that, as well as others, the true inquiry is, what
*115] did the parties intend? *and where such intention can be ascertained, the Law will give it effect accordingly. Taking this as our guide, let us then inquire whether the sum of five thousand dollars is in the nature of a penalty, or liquidated damages? By the contract Hodges was bound to do several things. He was to make a dam from Alwood's point, by Price's marsh, to Owens' machine dam. The dam was to be of sufficient height and tightness to protect Owens' field against

the inundation of the water. It was to be made under Owens' direction. Hodges was to furnish an overseer, and a certain number of hands; and lastly, the dam was to be finished by the 1st January, 1839. Now, according to the literal interpretation of this contract, the defendant was bound to pay the penalty, if he failed in the performance of any one of these undertakings. If he had made the dam in full performance of his agreement, in every particular, except that on the 1st January, 1839, a very small portion which would not cost ten dollars, remained unfinished, according to the plaintiff's demand he must pay five thousand dollars. If a small portion of it leaked, and the plaintiff by it was but little injured, or if he had made the dam perfect within the time, but yet had disobeyed the plaintiff's directions, or had ommitted for a single day to furnish his portion of hands to work, each of these would subject him to the payment of the whole sum, and for failure of all of them, he would incur no other or greater liability. It seems to me, it is only necessary to state the proposition, to determine at once that the sum of five thousand dollars could not have been the estimate which the parties themselves, or the arbitrators, had assessed, as the true damages which the plaintiff was to sustain. It may be that that sum was the estimate of Owens' loss, if the dam was not constructed at all, but they never could have intended the defendant should pay as much for failure in part, however inconsiderable, as for default in the whole. I do not perceive that this case differs in the result from the other cases, by the circumstance that after the award, and in pursuance of it, a bond in ten thousand dollars was entered into to secure the performance of the award. It is said there are two sums, and therefore both cannot be penalties. Though it strikes me it cannot alter the case, it removes some of the difficulties in the way of construing the contract; as the plaintiff desires, the same absurdity of making the damages for a part, equal to the whole, still remains. I do not *perceive the reason why this should have been done, or why, indeed, any second bond was necessary to secure the performance of this award, except that the first was in too small a sum, and as a second bond was necessary, they directed it to be in conformity with what is usual, in double sum. [*116

The general rule is, that for the non-performance of a contract, the party failing shall pay the other for any loss he may have sustained, and this loss is the true measure of damages. If this loss has been ascertained by the agreement of the parties, such agreement shall be carried into effect. If there be no such agreement, then the jury are to assess, upon a full view of the circumstances of the case. Justice requires a full indemnity, but nothing beyond; and hence, in the latter cases, the inclination of the Courts is to consider the sum agreed to be paid, rather as a penalty, than as liquidated damages, unless the intent seems to be otherwise.

In this case we are of opinion the instruction of the Circuit Judge was right, and the motion is dismissed.

The whole Court concurred.

See as to stipulated damages. *Worrell* vs. *McClenaghan*, 5 Strob. 115; *Allen* vs. *Brazier*, 2 Bail. 293. *Salterwhite* vs. *McKee*, Harp 397.

As to the *quantum* of damages. *Miller* vs. *Hilliard & Wade*, Chev. 152. *An.*

*117] *THOMAS KENNERLY *vs.* JOHN WALKER.

Where a *verdict* has been obtained against two defendants, upon a joint and several promissory note, and judgment has been entered up against both, and upon *appeal, a new trial* is ordered, *unless* the plaintiff discontinues as to one of the defendants: *Held*, that the plaintiff should discontinue before "*scire facias*" is brought.

To permit a discontinuance of one defendant to a record to be entered on the trial of a "*scire facias*," upon the plea of *nul tiel record*, would be irregular.

A general demurrer to a special replication to the plea of "*nul tiel record*," will be sustained, unless the replication denies the plea.

Before GANTT, J., at Barnwell, Spring Term, 1840.

This was a *scire facias* to revive a judgment entered up against the defendant, John Walker, and one Mary Gavin, on the 30th October, 1826. The original action was on a joint and several promissory note, in which the plaintiff obtained a verdict, at Fall Term, 1826, and entered up judgment accordingly. The defendants on the trial, moved for a nonsuit, because the note was not proved as to Mary Gavin, which being refused, they appealed, and made the same motion in the Court of Appeals, on the same ground. The Court of Appeals were of opinion that the testimony was not sufficient to entitle the plaintiff to a verdict against Mary Gavin. "But if it is a joint and several note he may retain his verdict against Walker, by discontinuing as to Miss Gavin; otherwise the motion must be granted." On the 13th March, 1835, the plaintiff sued out his writ of *scire facias* in this case against Walker alone, to revive the judgment, to which the defendant pleaded *nul tiel record*, on which issue was joined. At the July Term, 1838, the plaintiff obtained a rule on the defendant, to show cause on the first day of the next term, why the name of Mary Gavin should not be stricken from the record. The case stood thus until Spring Term, 1839, when the plaintiff obtained an order for leave, until the first day of October (then) next, to put in a special replication to the plea filed by the defendant. The plaintiff accordingly filed the following special replication: "And the said Thomas Kennerly, as to the said plea of the said John Walker, by him above pleaded, saith, that he, the said Thomas, by reason of any thing by the said John in that plea alleged, ought not to barred from
*118] *having and maintaining his action against him, the said John, because he saith, that although upon inspection of the record, it appears that the verdict in this case was against John Walker and Mary Gavin, yet the Court of Appeals, being moved by the defendants to set aside the verdict, concurred in the opinion that the testimony was not sufficient to entitle the plaintiff to a verdict against Mary Gavin, but they say, if the note is joint and several, the plaintiff may retain his verdict against Walker, by discontinuing as to Mary Gavin; and this the said Thomas is ready to verify before the Court here, and thereupon he prays that judgment be given by the said Court" To this plea the defendant filed a general demurrer, in which the plaintiff joined.

The case came on before his Honor, Judge GANTT, who, upon reading the opinion of the Court of Appeals, in conformity with the order of that Court, gave the plaintiff leave to discontinue as to Mary Gavin, and gave judgment on the pleadings and evidence for the plaintiff.

The defendant appeals, and moves to reverse the judgment, because,

1. The plaintiff was not entitled by law to discontinue as to Mary Gavin.

2. On the pleadings and evidence, the judgment ought to have been for the defendant.

The foregoing report consented to by the plaintiff's attorney, with the statement which follows:

The action was brought, originally, by Martin & Hay, and by Martin, the survivor of that firm, (on his promotion to the bench,) consigned to the present attorney for the plaintiff.

The case stood upon the docket, marked new trial, until Fall Term, 1834, when it was discontinued, and before the present disposition thereof, has not been urged to a conclusion by either party. The opinion of the Court of Appeals not obtained during the pendency of this suit previous to Spring Time, 1840.

Patterson, for the motion, on the first ground, contended that it was necessary to discontinue before the plaintiff could sustain his action of "*scire facias,*" and that by the order *nisi* of the Appeal Court, he could, within a year and a day, have *executed that order; neither was it necessary for the party to apply to the [*119
Court for order of discontinuance. No discontinuance being made within a year and a day, a nonsuit followed. After the lapse of twelve or fourteen years, it was supposed to be necessary to have the order of the Circuit Court.

2. On the pleadings, the defendant is entitled to judgment they do not fortify the declaration. Mr. P. then pointed out a variance in the judgment and the declaration. The judgment, he contended, was against two, and the declaration against only one. He cited *Com. Dig. Tit. Plead.* 47; and further contended, that unless the replication denied the plea, the judgment upon the demurrer should be sustained.

Mr. *Gantt*, contra, was absent.

Curia, per EARLE, J. The object of the motion made in the Circuit Court for leave to discontinue as to Mary Gavin, was to make the record uniform to the declaration, which set out a judgment against John Walker alone. No doubt the plaintiff might, after the judgment of the Court of Appeals, have entered his discontinuance as to Mary Gavin, and thus have retained his verdict against Walker. That judgment was pronounced in 1826. Within what length of time the plaintiff should have discontinued as to Gavin, in order to avail himself of the benefit of the decision, we will not undertake to determine here. It would seem at least that such discontinuance should have been entered before he brought his *sci. fa.* in 1835, at any time during that period. I apprehend the defendant would have been permitted to sign judgment of nonsuit, as the Court said "otherwise (that is, if the plaintiff do not discontinue as to Gavin,) the motion must be granted." We think it was irregular to permit such discontinuance to be entered on the trial of the *sci. fa.* upon the plea of *nul tiel record.* There was no such record as had been declared on, and the plaintiff was not entitled to the indulgence of being permitted to alter it so as to make it conform to the count.

Independently of that view of the plaintiff's case, we are very clear that the demurrer to the plaintiff's replication ought to have been sustained. The very object of pleading is to set forth the facts necessary to the party's recovery. Every *material fact should be distinctly [*120
averred, that it may be traversed by the other side. When the plaintiff, therefore, sought to avail himself of the *judgment* of the Court of Appeals, in his replication, he should have averred that the note sued

on was a joint and several note, and that in fact he had discontinued as to Mary Gavin. These were both material averments when he was about to offer in evidence a record and judgment against two, jointly, to support a declaration which set out a judgment against one. If in truth he had regularly discontinued before he brought his *sci. fa.*, it would have been a judgment against Walker only, and a special replication would have been unnecessary. Upon the pleadings, the plaintiff was not entitled to judgment. The motion to set aside is granted; and it is ordered that the defendant have leave to sign judgment on demurrer.

O'NEALL, EVANS and BUTLER, JJ., concurred.

See *Treasurers* vs. *Buckner*, 2 McM. 325, 1 Rich. 307. *An.*

JAMES ROBERTSON & Co. *vs.* ROBERT S. MILLAR.

Where there is conflicting testimony as to the genuineness of a signature, comparison of handwriting is admissible, as confirmatory evidence, to enable the jury to decide upon which of the witnesses they could most confide.

A bundle of notes that is admitted to prove the genuineness of a signature, by comparison of handwriting, may be sent to the jury.

Before his Honor, the RECORDER, tried in the City Court, November Term, 1840.

This was an action of assumpsit against the defendant, as indorser of a note, of which the following is a copy:

*121] *Charleston, 6th March*, 1840.

280 dollars. Five days after date, I promise to pay Robert S. Millar or order, two hundred and eighty dollars, for value received.

WILLIAM BOYD.

(Endorsed) *Robert S. Millar.*
James Robertson & Co.

Plea—The general issue. Defence—Forgery.

The following is the evidence:

Richard W. Cogdell, sworn—Said he is teller of the Bank of the State; has frequently seen defendant's handwriting in the bank; has seen notes on which Millar's name was, where Boyd's was not; thinks the name of Millar on this note is his handwriting; would have had no hesitation in taking it as his; he is, and was at the time of the protest of this note, notary of the bank; proves the protest; gave notice of non-payment to Millar, in person; Millar said he was not prepared to pay it; said nothing of forgery; in presenting other notes on several other occasions, Millar referred to a memorandum.

Cross-examined—He said he never saw Millar write; judges it is his handwriting from its similarity to other notes, which were not disputed, and which he has been in the habit of seeing in bank; the protest was before Boyd's death.

William B. Foster, sworn—Said he never saw defendant sign his name; has seen his name often in bank; should say this was his signature; has seen his name for years past in bank; witness is discount clerk of Bank of the State.

A. C. Smith, sworn—Said he is clerk in the Union Bank; this indorsement of

Millar bears the character of his handwriting; has seen notes of defendant which were admitted to be genuine; has had such in his possession; never saw this note before to-day.

Robert S Smith, sworn—Said he has seen defendant's signature to notes which he knows to be genuine; has seen him write, and should not hesitate to say that this endorsement is his handwriting; would have taken it in business as genuine; has received friendly notes from defendant.

**Robert Quash*, sworn— Said he is clerk of plaintiffs; recollects that plaintiff received notice of protest; he was sent to defendant to notify him; [*122 defendant said, "Boyd is sick, and if he would wait a few days there would be some freight from Columbia, and as soon as it came it should be arranged;" witness did not show the note to Millar.

Here closed the evidence of plaintiff.

DEFENCE.

William Young, sworn—Said he is defendant's only clerk; attends to all his business; knows all the paper he has out; has charge of all his notes; has seen Millar write; this endorsement is not his writing; never saw him write like this; there are marks there which he never saw him make; (these he pointed out to the jury;) witness kept a book of all notes of Boyd, on which Millar was endorser; this note is not in that book.

A bundle of notes on which Millar was endorser, which had passed through bank, were here submitted to witness, to prove the signatures genuine, with a view, by comparison, to aid the testimony to disprove the handwriting of Millar. This was objected to by Mr. Yeadon. I overruled the objection, and the witness proved the signatures genuine. The witness then pointed out to the jury wherein the difference consisted.

He continued—The day that Boyd was taken sick, three notes on which Millar was endorser, became payable; he went to Boyd's office to ask if he was not going to send for renewals; he met Vinro, who said that Boyd had gone home sick; that his clerk had gone up to him, and he supposed he would attend to the renewals at night; there were protests for about $2000 more than was justified by his entries; this created suspicion; went the week after and got statements from all the banks except the Bank of the State; there were several notes not on his list; he tried to get a statement from Boyd in 1839, but could not; several months before Boyd was taken sick, Millar stopped endorsing new business; may be a year; though he continued to endorse all renewals that corresponded with the book.

Cross-examined—He said he has been with the defendant since the fire of 1838; was with his brother from 1832; began with his book of notes endorsed in January, 1839; about *sixty days from that time he found that he was $4000 on [*123 Boyd's paper; he then determined to stop; he knew what were renewals from the book; never saw him endorse a new note for Boyd after sixty days from the 1st January, 1839; he said he would not.

Cross-examined—Mr. Yeadon presented him a note to John M'Nellage, of Boyd, endorsed by Millar, dated 19th September, 1839, at four months, for $140, and asked him if the endorsement was genuine; he said it was, and that it was a renewal, and referred to his book, and showed what note it was the renewal of; he said Boyd was in the habit of sending up notes to be endorsed, marked "renewal," and when he got them would tear that part off; Boyd did send up four or five months before his death a note to be endorsed to buy a boat, which Millar refused to endorse; Boyd died 22d March, 1840.

Here closed the evidence of defendant.

EVIDENCE IN REPLY.

W. W. Kunhardt, sworn—Said that he held Boyd to bail for John M'Nellage, and that he released him on his giving him the note of 19th September, 1839, endorsed by Millar; this was the origin of that note.

Cross-examined—He said he got the note from Boyd; had no communication with Millar.

WILLIAM BIRD *vs.* ROBERT S. MILLAR.

This was an action of assumpsit against defendant, as endorser of a promissory note, of which the following is a copy:

Charleston, 12th March, 1840.

250 dollars. Thirty days after date, I promise to pay to Robert S. Millar, or order, two hundred and fifty dollars, for value received.

WILLIAM BOYD.

(Endorsed,) ROBT. S. MILLAR,
W. BIRD.

Plea—The general issue. Defence—Forgery.

The evidence in the foregoing case of James Robertson & Co., is considered as given in this; the bundle of notes introduced, objected to and admitted.

*124] *Robert S. Smith*, the only witness examined in this case, being sworn—Said he believes the endorsement to be the handwriting of defendant; would take it as his without any hesitation; witness was loading a boat for Bird; while he was loading it, Boyd bought it; Bird would not let him have it without an endorsement; Millar's endorsement was given, and the boat delivered; thinks the note in suit is a renewal of that, because Boyd gave Bird an order on him for $65, the up freight of that boat to Camden; after this note came out of bank, he talked with Millar on the subject; he said that the note that came out of bank was not endorsed by him, but recollected endorsing an original note to Bird; this conversation was after Boyd's death.

These two cases were submitted to the jury on the evidence, and they found for the defendant in both cases.

The plaintiff's counsel served me with the annexed grounds of appeal.

JACOB AXSON, *Recorder*.

1. That his Honor erred in ruling that comparison of handwriting was admissible to *disaprove* the genuineness of defendant's signature in these cases.
2. That his Honor erred in allowing the *defendant* to submit to the jury, in these cases, a bundle of notes alleged to have been signed or endorsed by him, in order that the jury by comparison, might infer the forgery of his signature, or handwriting to the notes sued on.
3. That the verdicts were contrary to law and evidence.

Yeadon, for the appellants, argued that comparison of handwriting was not admissible to prove its genuineness, and in support of this position, cited 2 Starkie, 654; Peake Ev. 155; Phil. Ev. 428; 13 J. R. 238; 2 McC. 518. He contended also that it would be setting a dangerous precedent to suffer handwriting to be proved by comparison. Defendants could always select, and plaintiffs could not, to such an extent.

A. Moise, contra, cited Nor. Peake, 155—(25 Appendix.)

*125] *Curia, per* EVANS, J. The facts of these cases are, the defendant was sued on two notes, as the endorser of one Boyd. *On the trial, witnesses were examined on both sides; those for the plaintiff declaring their belief that the signature was the defendant's, and those for the defendant, that the signatures were forged. A bundle of other notes were handed to a witness for the defendant. He proved them to be genuine, and then pointed out to the jury the difference of Millar's signature to those notes and the signatures on the disputed notes. When

the jury retired to their room, they were allowed to take the bundle of notes with them, "that they might compare the handwriting of them with the handwriting of the notes in suit, with a view to test the accuracy of Young's (the witness for defendant,) testimony." The admissibility of this evidence, and its being allowed to go to the jury room, are the grounds upon which the case comes to this Court.

The general principle is to be found in all the elementary books, in Starkie and Peake, that mere comparison of handwriting, by juxtaposition, is inadmissible; that is, where the witness has no knowledge on the subject, he shall not be allowed to prove a signature genuine or false, by comparing it with what another witness proves to be the true signature. Admitting the principle to be correct, that such evidence is inadmissible in the first instance, yet, in a case of conflicting evidence, this kind of evidence was admitted in the case of *Plunket & Bowman*, (*a*) not as original, but as confirmatory evidence, to enable the jury to decide upon which of the witnesses they could most confide. In a practice of many years, I have not known the admissibility of this kind of evidence, for the purposes above stated, questioned. I have made these remarks because this question was much discussed by both sides, on the argument. The case itself may be decided on a ground entirely independent. The question was, whether the note was endorsed by the defendant? The witnesses on both sides were acquainted with the handwriting of Millar. The witness, Young, testified the signature was not Millar's. He was well acquainted with handwriting. The object, as I understood the report of the Recorder, of submitting the notes to the witness was, that he might point out to the jury the difference between the notes in dispute and the genuine signatures, and in this way to test the accuracy of his opinion that the notes were forged. If the notes were admissible for this purpose, I can see no reason why they should not be sent *to the jury. (*b*) It is the usual practice to send all written or documentary evidence to the the jury, unless there is some confusion in it likely to mislead. [*126

The motion is dismissed.

GANTT, O'NEALL, EARLE, AND RICHARDSON, JJ., concurred.

See *Desbrow* vs. *Farrow*, 3 Rich. 383. *An.*

JAMES HERRIOTT & JAMES PATTERSON *ads.* THE STATE.

Any agreement to fight with loaded pistols, and actually fighting in pursuance, constitutes a duel under the Act. And it does not depend upon the time when the agreement was made, but upon the fact of the agreement.

The circumstances attending a fighting with pistols, and the intention of the parties, are questions of fact to be left to the jury.

In the City Court, Charleston, before his Honor the Recorder, July Term, 1840.

The defendants were indicted for fighting a duel; the following is the testimony:

(*a*) 2 McC. 518; Post 473. *An.* (*b*) See 10 Rich. 214. *An.*

Solomon Moses, sworn—Testified he knows the defendants. On the night of the 24th May last, was with the jury in the Court as attending constable; between twelve and one o'clock, was called and requested to go next morning to the west end of Broad street, that there was to be a duel or posting, and the informant had no doubt there would be bloodshed. Joseph Yates was with him that night when he received the information, and accompanied him; on their way there saw Fell, Gibbes, Herriott and Patterson; followed Gibbes and Fell until they got beyond Trapman's, they then stopped. Fell took out a paper and stuck it up on a lamp post, witness and Yates were between the two parties. Herriott and Patterson were approaching. Fell, about this time, put his hand in his waistcoat, and wit-
*127] ness saw a pistol; he threatened to arrest him. *Herriott and Patterson were distant from them about the length of the court room, (City Hall;) they turned and walked away through Savage street, and stopped at a little distance; Fell and Gibbes came along. Gibbes followed Herriott and Patterson down Savage street. Gibbes promised him that nothing should be done that morning, and witness went away. Herriott and Patterson went down Savage street: the others up Broad street; there was some excitement at the time the paper was put up.

Cross-examined—Knows nothing of his own knowledge about the duel. From what he saw, he should say, the object of the parties was to post. The paper was taken town; don't know by whom; no one saw the paper but the posters who put it up.

Joseph Yates, sworn—Testified: went with Moses; before they got to King street, met the two Herriotts and Patterson; did not know at the time that they were the parties concerned; he and Moses went to the west end of Broad street, and sat down near Trapman's fence for some time; Moses said he did not think they would come, and proposed to go home; Moses left witness and went towards home; after Moses left him, he saw Fell and Gibbes get out of a buggy at Matthews' stables; he went after Moses and called him back. When they returned, saw Fell and Gibbes at the lamp-post beyond Trapman's. Gibbes asked Moses what brought him there? Moses said, to stop bloodshed; Gibbes said, this is no child's play; there is some other place besides Broad street. Gibbes, Fell, witness and Moses, walked to the corner of Savage street; the two Herriotts and Patterson were half way down Savage street; Gibbes went and spoke to Herriott and Patterson; the others went on; Gibbes overtook them; Moses went home, and witness went as far as the gate of the Catholic Church; looked back and saw Herriott and Patterson come up Logan street, to the corner of Broad street; Gibbes and Fell then returned towards them; all five met at the corner of Logan and Broad streets; Gibbes and Patterson spoke together, and they all went down Broad street, towards Trapman's. Witness followed them; when they got to Trapman's, all went on except the younger Herriott, and stopped at the lamp-post. Fell went towards Rutledge street. Herriott remained at the lamp-post. Patterson and
*128] Gibbes were in conversation. *Saw Gibbes walk towards Fell and return to the lamp-post, Thought they were conversing. They stood there about five minutes. Witness turned round to see who was coming, and heard two pistols in quick succession; he immediately ran towards them; met Gibbes and the younger Herriott running up Broad street; Gibbes said he was going for Dr. Frost; Herriott asked him to go up and stop the blood; the elder Herriott was leaning on Patterson's shoulder; he was shot in the cheek. Patterson asked witness to walk down and pick up the pistols; he picked up four pistols; saw Fell have a paper in his hand; did not see him post it up; just before they fired, Fell was standing with back to the west, Herriott with back to the east; Gibbes and Patterson were standing off, forming a square with the others.

Cross-examined—Said he was one hundred and fifty yards from them when they fired; they were five or ten minutes at the lamp-post before they fired; saw no preparations to take distance.

Lucas A. Ring, sworn—Testified and said he lives near the spot; saw Patterson and Herriott passing to the west end of Broad street, towards Rutledge street; saw what proved to be Fell and Gibbes at the lamp-post; Patterson and Herriott returned, and conversed a little; saw Fell go up to the lamp-post with a paper in his hand, as if to put it up; he withdrew his hand, still holding the paper; Patterson and

Herriott walked again to the west, stopped and conversed; Herriott remained and Patterson returned, spoke to the others, and then returned to Herriott; they both walked on and returned to Rutledge street; Patterson then returned and Herriott followed him; Patterson went up to Fell and Gibbes and staid a short time and returned, and met Herriott and conversed together; they then both returned to the lamp-post; when they got within ten or twelve paces, Herriott halted; Patterson approached Fell and Gibbes; about a half minute passed; Herriott retained his position. Patterson and Gibbes went into the middle of the street; each opposite the one he was with; Herriott and Fell retained their positions; when Patterson and Gibbes were nearly opposite their respective friends, they faced about; a second after the pistols were discharged. Herriott went towards Patterson and fell in his arms; the whole affair occurred in ten or twelve minutes; the position of the gentlemen formed a square.

Here the testimony closed: defendants offered no evidence.

*It is a mistake on the part of defendant's counsel, that I charged as attributed to me, in his first and second grounds. [*129

There was a good deal said on that subject in the course of the argument, by way of inquiry on my part for information as to some positions assumed in the science of duelling, and by way of comment on the authorities produced; but I certainly did not charge the jury on that subject.

When it was submitted to the jury, I charged them, that if they believed, from the evidence, that these parties fought in pursuance of a previous agreement to do so, that it was a duel within the meaning of the Act; it did not depend upon the time when the agreement was made but upon the fact of the agreement; or in other words, that if they believed that the said parties went, the one with a view to post, and the other to resist it, and the posting was superseded by an agreement to fight, and they did fight, that it was fighting a duel within the meaning of the Act, and that the defendants were obnoxious to the penalties of the law.

The jury found the defendants guilty, and they appealed on the following grounds:

1. His Honor, the Recorder, charged the jury that a duel might well be, where death ensues to one of the principals, and the slayer will not be guilty of murder.

2. His Honor directed the jury, that if two men agree to settle a present dispute by an immediate appeal to arms, and they forthwith fight with unequal weapons, it is a duel, and one may be killed, and the slayer be well convicted of manslaughter.

3. That the only evidence of a duel or agreement to fight, was wholly circumstantial, and if to be relied on, only proved an affray or riot.

Wilson, for the motion, said that a duel was a single combat, at a fixed time and place, in consequence of a challenge. That the custom came originally from the northern nations, among whom it was usual to decide all their controversies by arms. There were pledges given on their respective behalf. *He said*, that among the Germans, Danes and Francs, none but women, sick persons and cripples, and those under twenty-one, and over sixty years, were excused. Ecclesiastics, *monks and priests, were obliged to find champions in their stead. The penalty of the vanquished was either death by hanging or beheading, or mutilation of members, according to the circumstances of the case. [*130

The definition of duelling—*vide, English Dic. Tit. Duelling.* Duel, Mr. W. argued, at present is issued for single combat, or some private combat, and must be premeditated; otherwise it is but a rencounter. Duelling, in this last sense, had its origin in the year 1527, at the breaking up of the treaty between *Charles*

V. and Francis I. The former informed the herald of the latter, that he would hereafter consider him not only a base violater of public faith, but a stranger to the honor and integrity of a gentleman. Francis returned his herald with a cartel of defiance, in which he gave the usurper the lie in form, challenged him to single combat, requiring him to name his time and place and his weapons. Cited 2 Chitty's Crim. Law, 727; 3 *Ib.* 348.

Bailey, Attorney General, contra, said the Court will consider the meaning of the Legislature, and determine whether this is a duel under the Act of 1812. It is not the light in which the duellist regards duelling that is to govern, but the Court is to look to the intention of the Legislature upon the subject, and construe the Act accordingly. Mr. B. contended that any rencounter that follows from a posting is, of itself, a duel.

Curia, per RICHARDSON, J. This Court concurs with the Recorder, in his definition of a duel. Any agreement to fight with loaded pistols, and actually fighting in pursuance, constitutes a duel under the Act. The question was one of fact for the jury to decide. A challenge had passed and was said to be refused; the challenger threatened to post his opponent. The parties repaired to a certain spot with loaded pistols, attended by their respective friends, early in the morning. They were seen to form a square; the principals stood face to face, east and west of each other; the apparent seconds stood to the right or left of their principals respectively. I should have before stated, one of the apparant seconds, upon one party being intercepted by the officers, had before said it was no child's play; there is some other place besides Broad
*131] street; *and that a paper was put up before the fight and immediately taken down. But standing in the position I have described, the principals fired, and both were wounded. This may have been a sudden rencontre arising out of the posting. But the challenge, the preparation of pistols, the attending of friends, the time of day, and the conduct of the respective parties, also indicate a concerted duel; and the jury having decided under proper instructions, that it was a duel, the Court cannot interfere with their wholesome finding, and the motion for a new trial is refused.

The whole court concurred.

See *State* vs. *Cunningham*, 2 Sp. 253. *An.*

S. D. GRIMKE *vs.* HENRY HOUSEMAN.

Where a trespass for beating a slave has been clearly proved, without any legal justification, and the jury find a verdict for the defendant, a new trial will be granted.

Before RICHARDSON, J., at Charleston, January Term, 1841.

This was an action of trespass for beating the plaintiff's slave. The trespass was clearly proved, and I could perceive no cause to justify the defendant, although there appeared some extenuating circumstances. The case was submitted to the jury, under the charge that they should find something for the plaintiff. They thought differently and found for the defendant.

The plaintiff appeals, on the grounds:

1. Because the verdict of the jury was contrary to the charge of his Honor and to law.

2. Because, inasmuch as the trespass was proved and not rebutted by contra testimony, they were bound to find for *the plaintiff, if it were but nominal damages. [*132

3. Because the verdict was otherwise contrary to law and evidence.

Curia, per BUTLER, J. It was proved beyond doubt that the defendant had been guilty of an unjustifiable trespass on the plaintiff's property. I can see very little to excuse, and nothing to justify his conduct. He undertook, by unauthorized violence, to redress the grievance of his own slave, not at the time when the insolence complained of was offered, but with deliberation, he pursued the plaintiff's servant and beat her in her own house. Common courtesy required that he should have complained to the plaintiff, if he had any cause of complaint, before he took redress in his own hands. The great object of the law is to give security to the enjoyment of property, free from an illegal interference with it against the consent of the owner. The position of a man enables him generally to maintain a practical control and protection over his own property without appealing to the law. But a woman must look to the law alone for protection when her rights are invaded and her feelings insulted by one who has neither a sense of justice, or courtesy to respect them; and it would be a reproach to the administration of justice, were a jury allowed to find against such a plaintiff, where she had established an undeniable cause of action. It will not do for the law to allow redress and permit its tribunals to deny it. Frivolous actions should not be countenanced, but juries must respect the legal position, and even technical right of parties in Court. In the case under consideration, the plaintiff established a clear legal cause of action, and the jury had no right to find for the defendant. Such is the purport of the decision in the case of *Norrel* vs. *Thompson*, (2 Hill, 470,) that if a trespass be proved, the plaintiff is entitled to some damages, though they may be nominal; and when in such case, the presiding judge instructed the jury that, as the trespass was inconsiderable, they might find for the defendant, which they did, a new trial was granted.

My brother O'Neall has mentioned to me another case, tried at Newberry, more like this, but much stronger for the defendant. The plaintiff's negro was whipped by a patrol. It appeared that the negro had a ticket at the time, which did *not designate the place he should go; [*133 the defendant thought the ticket legally insufficient, and whipped the slave; the jury found a verdict for the defendant, which was set aside by the Court of Appeal, on the ground that the defendant had no legal justification, and that the jury were bound to find something for plaintiff; which was the result of a second trial.

The motion in this case is granted.

The whole Court concurred.

James Rhett, for the motion. *Kunhardt*, contra.

See *Watson* vs. *Hamilton*, 6 Rich 82. *Elliott* vs. *Wadham*, 2 Sp. 168, 1 N. & McC. 85. *An.*

S. D. King & Co. *vs.* C. H. Colding.

Parol evidence is inadmissible to explain a written contract, or to vary it, unless where there is ambiguity.

Before Evans, J., at Barnwell, Fall Term, 1840.

This was an action of assumpsit on a joint and several note, signed by the defendant and three or four others. The note was for about $3000, dated in December, 1837, and due some months after. The other makers of the note had confessed judgment. On the left hand of the signatures, certain figures in pencil were made in a line with the signatures, which were added up at the bottom, and made the sum for which the note was given. The defendant offered parol evidence to prove the note was given for the sum of the several purchases made by the signers; that the figures opposite to each name showed the amount of the several purchases, and that at the time the note was made, it was agreed between the payors and payees, that although the note was joint and several, for the whole amount, yet the payors were to be *severally liable for
*134] no greater amount than their respective purchases, as indicated by the figures in pencil. This I rejected, as varying the written contract by patrol; and the defendant's counsel gave me notice of appeal.

Bellinger, the counsel for the motion, being absent, *Northrop* argued this case. He contended that the figures in pencil were to be considered as a part and parcel of the note, and not a memorandum. If the note had been as a joint note and opposite each signature the amount was placed in figures, parol testimony would be allowed to explain, it being of a *doubtful character*. He said the consideration should be looked into. Cited here, Harper's Rep. 293; 1 Bail. 537. Parol evidence was admitted to explain written; 2 Bail. 305; 4 McCord, 469 and 473.

Patterson, contra, submitted the case without argument.

Curia, per Evans, J. The figures in pencil opposite to the names of the signers of the note were probably intended to indicate the amount of the several purchases of each, but there was no repugnance between this and the body of the note. They created no ambiguity, and if they had, it was not such an ambiguity as parol evidence is admissible to explain. The note was a common joint and several note, and the evidence offered was to vary it, to make it a several note of each of the signers, for sums which, when added together, would make up the whole sum which the several signers had jointly and severally promised to pay. This was clearly inadmissible, and the motion is dismissed.

The whole court concurred.

See *Post* 467; 2 Strob. 123; 2 Bail 342, 305; 5 Rich 511. *An.*

*Frederick Wesner *ads. Guardian of* Tom Brister. [*135

Under the Act of 1740, any negro claiming to be free, has the right, by guardian, to bring an action of trespass in the *nature of ravishment of ward;* not only against any one claiming property in, but against any one having the possession of such negro.

In the City Court, Charleston, before his Honor J. Axson, Recorder, April Term, 1840.

This was a case of ravishment of ward, to try the freedom of Tom Brister. The evidence is all in writing. I ruled that the master of the workhouse was liable to this form of proceeding. The jury established the freedom of Tom, and the City Attorney served me with the annexed grounds of appeal.

The written testimony presented the following case:

Tom Brister was a free person of color, resident in Florida, who executed an instrument of writing to Mr. John Yeomans, of which the following is a copy:

Territory of Florida, Duval County:

Know all men by these presents, that I, Thomas Brister, colored man, for and in consideration of Mr. John Yeomans having paid certain sums of money for me, viz.: $200 to Mr. James Stevens: $30 to Mr. William Colson, and divers other sums for different purposes, all for my interest, happiness and welfare, I do hereby bind myself to serve Mr. Yeomans as a laborer for the term of five years from the date of these presents; and do hereby further promise that if he, said John Yeomans, bargains or sells my said time for five years, to any other person or persons, then I will well and truly serve them as a laborer, to the best of my abilities, until said time is out.

Given under my hand and seal, in the town of Jacksonville, this 11th day of August, A. D. 1839.

his
THOMAS ✕ BRISTER. [L. S.]
mark.

Signed, sealed and delivered in the presence of
Stephen D. Fernandez,
Chester Bisbee.

*Mr. Yeomans sent Tom Brister to Mr. Thomas N. Gadsden, [*136
the broker, for sale, when Mr. Gadsden committed him to the workhouse for safe keeping. From statements made by Tom Brister, of his freedom the present action was commenced.

GROUNDS OF APPEAL.

1. That the master of the work house is not liable to an action to try the freedom, or for the delivery, of a negro lodged there, by any other person than the parties who lodged him in the work house.

2. That the negro had been properly received and detained by the master of the workhouse, under the circumstances in testimony by the defendant.

3. That the defendant is not liable to the costs—he is a public officer under a State Law.

Mr. Eckhard, City Attorney, for the motion.

Is the master of the workhouse liable to any person lodging a slave in the workhouse, but the person lodging him?

Mr. E. cited P. L. (by Grimke,) 169, 195 and 332, and contended that the workhouse was a public institution, and established by authority. That it was analogous to the pounds in England. Cited 2 Cowp. 478; and said trespass would not lie against a pound keeper. He then cited City Laws, head *Workhouse*. It

was further argued by Mr. E. that the defendant was authorized to detain Tom Brister, under the circumstances. He also said that it was competent for a free person of color to make a contract, depriving himself of his freedom for a term of years; and the person so owning him for the time being, had a right to sell him in South Carolina, as much so as in Florida.

Mr. J. B. Thompson, contra offered no argument, but submitted the case to the judgment of the Court, under all the circumstances attending it.

Curia, per BUTLER, J. In connection with the facts stated in the report of the Recorder, the following facts were stated and admitted on the hearing of this cause: That John Yeomans, residing in Florida, *137] assuming to be the absolute owner *of Brister, sent him to Thomas N. Gadsden, a broker, to be sold as a slave. Under the impression that Brister was a slave, Gadsden committed him to the workhouse of Charleston, of which defendant was keeper, for safe keeping until he could effect a sale. Yeomans' instructions were that Gadsden should sell Brister to some one who would carry him to New Orleans, stating that Brister would endeavor to make such statements as to procure his discharge, but that Gadsden must not believe him, &c. After Brister was committed, he made such communications as to induce the keeper of the workhouse to write to one Archibald Clark, residing in Georgia, to know if Brister was a free man, as stated by himself. Clark returned an answer, saying that he was, and that he (Clark) was his guardian; and also sent an affidavit of the same purport; upon which, the attorney of plaintiff made a demand that Brister should be released. In the mean time, Gadsden wrote to Yeomans of what had passed. Yeomans then sent the contract, noticed by the Recorder, showing the true relation between himself and Brister, to wit: a personal obligation for the services of Brister for a limited term. From this, Gadsden became satisfied that Brister was not liable to be sold as a slave, and called and paid the fees of the workhouse, and at the same time discontinued any further agency or control over Brister. Under this state of facts, the plaintiff was put to his action of ravishment of ward, allowed by the Act of Assembly of 1740,(*a*) by which it is provided that the Court, &c., may appoint a guardian for any person of color claiming to be free, and that such guardian may bring an action in the nature of ravishment of ward against any person who shall claim property in, or who shall be in the possession of, any such negro, &c.; and it is further provided, that such defendant shall and may plead the general issue on such action brought, and the special matter may and shall be given in evidence, &c. Such was the state of pleadings in this case, the true issue of which was to try Brister's right to freedom. From the evidence on the trial, it was unquestionable that his liberty had been put in jeopardy, and that he was entitled to be discharged from custody, as a free man of color. Gadsden committed and Wesner received the plaintiff into custody, without any wilful participation in the infamous fraud attempted to be committed by Yeomans; and perhaps it would not *138] be right to hold the latter *liable for damages, as for a trespass in the wrongful taking and imprisonment of the plaintiff. In general, I should think that he ought not to be held liable to any action by a third person for negroes committed to his custody, until after demand made

(*a*) 7 Stat. 397, § 1. *An.*

and a wrongful detention and conversion on his part against the rights of the true owner; as by the City laws, sec. 5th, page 356, it is made the duty of the keeper of the workhouse to admit and confine all slaves delivered into his charge or custody by the order or in behalf of their respective owners, or committed by the intendant, &c. The defendant was therefore justified in receiving Brister into his custody, from his ostensible owner. But this justification ceased after Gadsden paid the fees and discontinued his control over Brister. From that time the defendant held him on his own responsibility, or by the direction of the commissioners of the workhouse, and had no further right to claim exemption from liability to this action. Indeed, without the defendant had been liable, the plaintiff would have been without remedy, so far as his actual imprisonment was concerned. A suit against Gadsden, if any action would have lain against him, after he had discontinued his agency in the matter, would have afforded no relief; and Yeomans was beyond the jurisdiction or reach of legal process. The necessity of his situation gave him a remedy afforded by this action. The Act, however, under which this action is brought, is explicit and peremptory in its provisions, that any negro claiming to be free, has a right, by guardian, to bring an action of trespass, in the nature of ravishment of ward, against not only any one claiming property in, but against any one having the possession of, such negro. The defendant, who had the actual possession of the man claiming his freedom, was therefore liable to this action, and can take nothing by his motion. Motion dismissed.

The whole Court concurred.

See *Huger* vs. *Barnwell*, 5 Rich. 275. *An.*

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*THE STATE BANK *vs.* JOHN CESSFORD KERR. [*139
THE SAME *vs.* STODDARD, MILLER & CO.

The protest of a note for non-payment, and legal notice to the endorser, binds the endorser for the payment of the debt.

"The surety is bound by the terms of his contract, and if the creditor, by *agree-*
"*ment* with the principal debtor, without the concurrence of the surety, varies
"these terms, by enlarging the time of performance, the surety is discharged;
"for he is injured and his risk increased."

Where a new contract had been made by the defendant, Kerr, with the bank, (which he never complied with,) by which he was to have five years, by substituting new notes with the same endorsers, in lieu of the suit; it was held not to be such a variance as to discharge the endorsers.

Before RICHARDSON, J., at Charleston, January Term, 1841.

This was an action by the State Bank, as the holder of a promissory note drawn by defendant, in favor of H. Stoddard, Miller & Co. The note was for the sum of $750, and dated 18th March, 1840, payable eighteen days after date. The handwriting of the parties was admitted. The defence relied upon was a certain deed which was introduced in evidence by the defendant, dated the 22d day of June, 1840, and executed between the defendant, on the one part, and James Rose, President of

the South Western Railroad Bank The deed recited that the defendant, by reason of misfortune, was unable to pay and satisfy to his creditors the sums of money to them respectively due and owing; that he was desirous of securing and satisfying his creditors, and for that purpose transferred to the said James Rose all his property, as the same is therein described and set forth, subject to certain conditions thereinafter expressed of and concerning the same; that "in consideration of the premises, the said James Rose had agreed to certain conditions, covenants and agreements, as well on the part of the said party of the second part, as on the part of all others who are creditors of the said John Cessford Kerr, to be observed, kept and performed, which said covenants and agreements are hereinafter more particularly set forth and expressed, and for the faithful preserving, performing and keeping of which the said party of the second part, and all other person or persons, party or parties, as named in the schedule, creditors of the said John Cessford Kerr, are and shall be, pre-
140] viously to the full effect and efficacy of these presents respectively, unto the said John Cessford Kerr, by these presents firmly held and bound."

In the argument of the case before me, great stress was laid upon the precise words of the deed. I have, therefore, given the above extract from the deed, and will do so in the other part of the same instrument, to which I shall have occasion to allude. After conveying a considerable amount of property, the following trusts, upon which the questions in this case are made, are declared and expressed. "In trust to pay, discharge and satisfy, in equal portions and rateably, the sum and sums of money respectively due and owing to the several parties who are, or may become, parties to these presents, according to the terms of payment hereinafter expressed and agreed upon." "And it is also well understood, covenanted and agreed upon, by and between the said John Cessford Kerr and the said party of the second part, and also all other party or parties to these presents, that no part or portion of the property hereinafter conveyed, shall be sold, conveyed or disposed of before the expiration of five years, commencing from the date of these presents, unless with the consent of the said John Cessford Kerr, thereto by him given and subscribed in writing."

In another part of the deed this clause appeared immediately after the *habendum* in the deed. "Subject to, nevertheless, the following trusts, conditions, covenants and agreements, of and concerning the same, &c., that is to say, that the said John Cessford Kerr shall be allowed by the said party of the second part, and by all other person or persons, party or parties, creditors of the said John Cessford Kerr, set forth in the said schedule, to substitute for the promissory notes of the said John Cessford Kerr, now by them held respectively, or for which they, or any of them, may be responsible, other new notes of the said John Cessford Kerr, and endorsed in the same manner as the original notes for which they have been substituted: and that the said new notes shall be made payable in five equal annual instalments, commencing from the day of the date of these presents."

On the part of the defendant it was contended, that by the terms of the deed, the defendant was entitled to a new credit of five years; that this was an agreement upon good consideration, as the defendant had trans-

ferred his property upon certain* conditions, of which this was one; and that the plaintiffs had therefore no right of action against him. That the agreement to substitute new notes, was a privilege given to Kerr, which he could exercise or not; that it was not a condition. For the plaintiffs it was urged that this was a condition, a part of the contract on the part of Kerr, that he was to give the new notes, and in relation to all claims against him where such new notes were not given, he had failed in the performance of a covenant on his part. I considered the position last stated as correct, and so charged the jury; a verdict was taken for the amount of the note with interest, and the defendant appealed, on the annexed grounds: [*141

1. Because, by the deed offered in evidence by the defendant, a new credit was given to the defendant for valuable consideration by the same, the plaintiff was estopped from proceeding at law, until default made in the new credit.
2. That so much of the deed as relates to the substitution of new notes for the old notes held by the State Bank, was nothing more than a privilege given to the defendant, and it was left to him to use it or not, as he pleased.
3. That by the said deed, the parties to the same were bound not to proceed to sell any portion of the said property, and consequently they will be estopped from proceeding at law, or otherwise where the result of a verdict for the plaintiff would give the fullest power to exercise the right, which was renounced for five years.
4. That the verdict was in other respects against the law and evidence.

THE STATE BANK *vs.* STODDARD, MILLER & CO.

This was an action brought by the State Bank against H. Stoddard, Miller & Co. as the endorsers of a promissory note made J. C. Kerr, for $750, dated the 27th day of March, 1840, and payable eighteen days after date. The note was not paid at maturity by the drawer, and was duly protested *for non-payment. The handwriting of the parties was admitted, and the defence was that the conduct of the plaintiff had discharged the endorsers. John C. Kerr, the drawer of this note, having become unable to pay his creditors the amount due to them, executed to James Rose, President of the South Western Railroad Bank, a conveyance of his property mentioned in the said deed, upon certain conditions and for certain purposes expressed in the said deed. Such portions of the said deed as were particularly commented on, and furnished a clear understanding of the positions contended for, I have extracted; they are as follows: after specifying that Kerr is unable to pay, that he desires to secure his creditors, and has for that purpose transferred his property to the said James Rose, it proceeds to declare that "in consideration of the premises, the said James Rose hath agreed to certain conditions, covenant and agreement, as well on the part of the said party of the second part, as on the part of all others who are creditors of the said John Cessford Kerr, to be observed, kept and performed, which said covenant and agreement are hereinafter more particularly set forth and expressed, and for the faithful preserving, performing and keeping of which, the said party of the second part, and all other person or persons, party or parties, as are described in the schedule, creditors of the said John Cessford [*142

Kerr, are and shall be, previous to the full effect and efficacy of these presents, respectively, unto the said John Cessford Kerr, by these presents, firmly held and bound." The following clauses of the deed were also brought to the view of the Court. "Subject to, nevertheless, the following trusts, conditions, covenants and agreements, of and concerning the same, &c., that is to say, that the said John Cessford Kerr shall be allowed by the said party of the second part, and by all other person or persons, party or parties, creditors of the said John Cessford Kerr, set forth in the said schedule, to substitute for the promissory notes of the said John Cessford Kerr, now by them held respectively, upon which they or any of them may be responsible, other new notes of the said John Cessford Kerr, endorsed in the same manner as the original notes for which they have been substituted; and that the said new notes shall be made payable in five equal annual instalments, commencing from the day of the date of these presents." And the following trust is also extracted from the *deed. "In trust to pay, discharge and satisfy, in equal portions and rateably, the sum and sums of money respectively due and owing to the several parties who are or may become parties to these presents, according to the time of payment hereinbefore expressed and agreed upon. And it is also well understood, covenanted and agreed upon by and between the said John Cessford Kerr and the said party of the second part, and also all other party or parties to these presents, that no part or portion of the property hereinbefore conveyed, shall be sold, conveyed or disposed of before the expiration of five years, commencing from the date of these presents, unless with the consent of the said John Cessford Kerr, thereto by him given and subscribed in writing." The State Bank became a party to this deed.

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For the defendant, it was contended, that the State Bank being a party to the deed, consenting to and bound by all the covenants and conditions of the deed, without the consent of the endorsers had discharged them from their liability; that here was not only indulgence given to the drawer, by agreeing that his property should be kept secure from sale for five years, but that the bank had moreover set apart a certain portion of the property of the drawer for certain purposes; that here there was a new contract, new security taken, which, as it prejudiced the remedies of the endorsers, discharged them from all their liability. It was contended on the other side, that there was no indulgence, and that the endorsers were not prejudiced by the conditions of the deed. I was decidedly of opinion, that indulgence by the deed was given to the drawer; that the bank had, by its becoming a party to the deed, agreed that Kerr might pay the debt in five equal annual instalments; that for five years it was agreed his property should be protected: that this protection of the property was a prejudice to the endorsers, without their consent, and of course discharged them. I told the jury that if the holder entered into a new contract with the drawer, gave him indulgence, or so acted as to impair the right of the endorser against the drawer, that such acts were at the risk of the holder, and would discharge the endorser; and that in this case there was no doubt that the conduct of the holders of the note had in law discharged the endorsers. The jury, however, found a verdict for the plaintiff, for the whole amount of the note with interest, and the defendant appeals, on the annexed grounds:

*144]

1st. Because the deed produced on the part of the defendant, clearly established an indulgence, in giving time to the drawer, without the consent of the endorsers; which was sufficient to discharge the endorsers.

2d. That the said deed established that the plaintiffs, without the consent of defendants, who were endorsers, became parties to the same, and by the terms of the said deed, agreed that the property of the drawer should be protected from all sale for five years, unless with the consent of the drawer.

3d. That the case made was one where indulgence, in an extension of the time of payment, by preserving the property of the defendant from sale for five years, was given to the drawer, without the consent of the endorser, and this is sufficient to discharge the endorser.

4th. That the case was one where the holder takes new security to the prejudice of the endorser, which discharges him from his responsibility.

5th. That the jury were charged most distinctly by his Honor, the presiding Judge, that the defendants were discharged, and this charge of his Honor on a point of law, was binding on the jury, and should have been observed.

6th. That the verdict was clearly contrary to all the evidence and the law of the case.

Magrath, for the motion, said, that where time was given, on indulgence, it would discharge the endorsers. Cited 1 Bay, 466; 1 Mills' Cons. Rep. 371; 1 N. & McC. 117; 6 Peters, 257.

H. A. DeSaussure, contra, contended that no time or indulgence had been given; that the very day the eighteen days expired, the defendant refused or failed to pay, the bank instantly brought suit. He also contended that the deed was but a limited one, and not general, as to all Kerr's creditors, assigning only a certain specific portion of his property, leaving the balance unincumbered and liable for his debts. He further said that the conditions of the deed were not complied with by Kerr; and that the defence was founded upon a misconstruction *of the deed. It was a condition precedent. Cited 1 H. Black. Rep. 270; 1 Bacon, 261; 3 Comyn's Dig. 90 and 91, note F; Chitty on Bills, 292. [*145

Magrath, in reply, contended that the intention of the bank was not to be considered, but the acts of the bank. The releasing of Kerr by the bank, whether they intended to release the endorsers or not, operated as a release to them.

Curia, per O'NEALL, J. After a note has been protested for non-payment, and notice legally given to the endorser, he becomes, like any other unconditional security, bound for the payment of the debt. A mere giving day to the principal, or forbearing to enforce the collection of the debt, would not generally discharge the security, *Picket* vs. *Land*, (2 Bail. 608.) In *Weyman* vs. *Kirby*, 2 Bail. 551, 553,) (*a*) the rule extracted from *King* vs. *Baldwin*, (2 J. C. R. 559, 560,) "that the surety is bound by the terms of his contract, and if the creditor by *agreement* with the principal debtor, without the concurrence of the surety, *varies these terms*, by enlarging the time of performance, the surety is discharged, for he is injured and his risk increased," met the approbation of the Appeal Court. This rule must decide these cases; for if the Bank has varied the terms of Kerr's contract, by enlarging the time of performance, then Stoddard, Miller & Co., the endorsers fixed by notice are discharged. We shall be at once able to decide the cases by enquiring, had the Bank, by the contract in proof, so varied the terms of Kerr's note, and so enlarged the time of payment, that he could not be sued? if so, he, as well as Stoddard, Miller & Co.,

(*a*) Sup. 84. *An.*

is protected, but if not, then all are liable. The provision in the deed to give to Kerr the opportunity of paying this debt, as well as his other debts to the State Bank, in five equal, annual instalments, depended upon his substituting for the note now in suit, another note with the same endorsers; this was not done, and of course there is nothing in this provision of the deed which varies the terms of the defendant's note. The only provision which looks like an enlargement of the time of performance is that which declares that no part of the property conveyed shall be sold in five years But that does not vary the terms of Kerr's note. He was still liable to pay it presently. He might be sued upon it at any moment. This being so, the endorsers, Stoddard, Miller & Co., *146] cannot complain. *For every thing remains as before, so far as their contract is concerned. Under the judgment recovered in this case, any property which Kerr may possess, and which is not under some legal incumbrance, may be sold in satisfaction. The deed before us, which exempts his property from sale for five years, is nothing more than giving a preference to such creditors as come in and give their assent to it within the time limited. That opportunity was offered to these defendants, and that they did not avail themselves of it, is perhaps more their misfortune than their fault. Still they cannot complain of the Bank for holding them liable presently, when their own neglect compelled the present course. It may be, that if their failure to sign the deed was accidental, that they may, in another Court, be still allowed to come in and have the benefit of its provisions. On looking through the deed, I think all its provisions are greatly for the benefit of Kerr's endorsers, and that the delay of sale for five years of the property contained in the deed, may be the means of paying his debts, without resorting to them. If so, this provision would not increase the risk of, and would be no injury to, the endorsers, and in that point of view would not come within the rule for their discharge.

The motion is dismissed.

Evans, Earle, and Butler, JJ., concurred.

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*147] *Sherman and Debruhl *vs.* Judah Barrett.(*a*)

An applicant for his discharge under the Insolvent Debtors' Act, will not be permitted to discontinue or withdraw his application after a suggestion charging his schedule with fraud has been filed. (*b*)

A defendant's schedule is amenable, under the discretion of the Court; but it must be shown by affidavit, or otherwise, to the satisfaction of the Court, that the omission to insert the property omitted in the schedule, arose from ignorance, inadvertence, or mistake. He will not be permitted to amend, if it will create surprise or delay to the other party.

Whenever the right of a person to be discharged is resisted, on the ground of fraud, it is not necessary that there should be any showing on oath, unless the result of the allegation would be to delay the hearing of the debtor's application.

(*a*) S. C. again and again; 2 Sp., 529; 1 Rich, 457; 2 Strob., 553. *An.*
(*b*) See *N. Cohen's* case, 11 Rich.; *Sleeper & Fenner, N. A. Cohen. An.*

In that event, the Court, in the exercise of a sound discretion, may require the creditor to verify his accusation by affidavits.(*a*)

The limitation of time, in the seventh section of the Prison Bounds' Act, (P. L. 457,)(*b*) applies solely to undue preference; and a fraudulent sale or conveyance, and a fraudulent preference, are two distinct things.

A witness attending under a subpœna *duces tecum*, is not required to testify, but merely to bring into Court a paper which the party needs.

A deed to a concubine to procure future cohabitation is void; also, a deed for services rendered by a kept mistress is void, if the grantor be in debt at the time of the conveyance, or continues to retain possession of the property from the date of the deed until he becomes insolvent.

Where a debtor had conveyed to his son-in-law a number of houses and lots in the town of Columbia, and a number of slaves, for which he is said to have received a large sum of money, and at the date of the conveyance was very much in debt; on the trial of the validity of his schedule, it was held that the *onus* lay on the defendant, to account for the proceeds of the sale of this property.

When a debtor alleges that the proceeds of a sale of property made by him, has been gambled away, the question of his gaming may be submitted to the jury, and their finding will not be disturbed.

Before O'Neall, J., at Charleston, January Term, 1840.

The defendant was an applicant for the benefit of the Insolvent Debtors' Act. During the first part of the term, held by my brother Evans, the plaintiffs, two of his creditors, appeared and objected to his discharge, and filed their suggestion, charging the defendant's schedule to be fraudulent in many particulars. Monday of the last week of the term was fixed at that time for the trial of the cause. It was, to accommodate the bar, allowed to stand over until Friday. When the trial was about to proceed, Mr. Yeadon, for the defendant, moved *for leave to withdraw his applications for a discharge, and brought [*148 to my view that no formal issue had been made up. The plaintiffs insisted on their right to try the issue. I thought according to the case of *Walker* vs. *Briggs*, (1 Hill, 291,) he could not be permitted now to withdraw his application. A motion was made to continue the case, on the ground that the defendant had not had sufficient time to answer the facts set out in the third allegation of fraud on the part of the plaintiffs. No affidavit was submitted, and the defendant did not show himself in the court house. The motion was overruled. The defendant's counsel made repeated motions to amend his schedule, by inserting therein all his interest in the western lands, the house and lot and negroes and other personal property conveyed to Eliza Smith, alias Barrett, and the houses and lots and slaves conveyed to Jacob Cohen; these motions were made before the case was gone into, and were repeated at various stages of the case. But I never thought it was shown that the omission to insert the same in the schedule arose from either ignorance, inadvertence or mistake. Throughout the case, no such affidavit of the defendant was presented. Indeed, he was not present to amend his *schedule, if any order had been made. The defendant's defence [*149 seemed to be that his schedule was true, and that he had no interest in the property alluded to; and if there was any surprise in the matter on his part, it was that the plaintiffs were prepared to prove that he had an interest, and he was not prepared to rebut their testimony; and to

(*a*) Sup. 66. 11 Rich. 360. (*b*) 5 Stat. 79. *An.*

get out of this difficulty, it was proposed to amend the schedule. I thought that I ought not to permit the amendment. It was, at the very moment of trial, making an entirely new issue, and would both surprise and delay the plaintiffs. Mr. De Saussure stated no fact that went to show either ignorance or mistake on the part of the defendant, about the western lands. He said that he called on Barrett during his confinement and spoke to him on the subject; that he was very chary in imparting information, but told him he would in a few days send him a statement; one in a few days was left at his office by Mr. Cohen. When

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State of South Carolina, Charleston District:

Be it remembered, that on the fifteenth day of January, in the year of our Lord one thousand eight hundred and forty, to which day the suing creditors of Judah Barrett, who is in custody of the Sheriff of Charleston District, by virtue of sundry writs of *capias ad satisfaciendum*, at the suits of Coleman Bedford and Christian P. Bookter, and all others to whom the said Judah Barrett is in any wise indebted, were summoned and notified to be and appear before the Judges of the Court of Common Pleas, at the Court to be holden at Charleston, in the District and State aforesaid, to show cause, if any they can, why the said Judah Barrett should not be admitted to the benefit of the Acts of the General Assembly made for the relief of insolvent debtors, according to the prayer of his petition in that behalf, come here into Court S. C. Debruhl, a judgment creditor of the said Judah Barrett, and L. Sherman, a creditor of the said Judah Barrett, by De Saussure, their attorney, and give the Court here to understand and be informed that the said Judah Barrett ought not to have the prayer of his petition granted, and ought not to be admitted to the benefit of the said Acts, for divers causes and considerations hereinafter set forth and specified, that is to say:

First—Because the said defendant, Judah Barrett, has within three months before his confinement paid some one or more of the creditors of him the said Judah Barrett, the debts due by him to them, or one of them, in preference to the debts of these relators, and such preference of one creditor, *per se*, deprived the said Judah Barrett of the right of taking the benefit of the said Acts, according to the statutes in such case made and provided.

Second—Because the said Judah Barrett has not inserted in his schedule, nor accounted for, a certain large sum of money, to wit: the sum of sixteen thousand five hundred dollars, paid, or seemed to be paid to him; nor for certain other large sums of money accruing from his sales of certain negro slaves belonging to him, and which sums he reserved in his hands, as stated in his letter to certain of his creditors, to enable him to enter into new business; nor has he set forth in what property the same was invested, nor in any manner accounted for the said property.

Third—Because the schedule filed by the said Judah Barrett, purporting to be a schedule of all the real and personal estate of the said Judah Barrett, does not contain a just and true account and enumeration thereof, but is false, fraudulent and covinous, inasmuch as it does not contain several thousand acres of land in the States of Mississippi, Alabama and Arkansas; numerous lots in the town of upper and lower Aberdeen; houses and lots in New Aberdeen and New Alabama; sundry lots bought of the Columbus Land Company, and other real estate; which said houses, lands and lots, were purchased by, or on account of, the said Judah Barrett, some time in the years 1836 and 1837, and are now held under titles either in his own name or in the name or names of some other person or persons, as these relators charge and believe, upon secret trusts not apparent upon the face of the deeds, but which enure in fact to the use and benefit of the said Judah Barrett, or are covinously held by other person or persons under fraudulent confessions of judgment or judgments, by default, to hinder, delay and defraud the bona fide creditors of the said Judah Barrett, of their just and legal rights, or were conveyed, fraudulently, for a mere nominal or very inadequate consideration, to some other person or persons, to defraud his creditors.

Fourth—Because that the said Judah Barrett, some time in the year of our Lord

it was about to be given in evidence, the defendant's attorney objected to it, on the ground that it was not shown to have come from the defendant. It was excluded. What were its contents I do not know. Mr. Cohen's affidavit can be produced and will speak for itself. Under the insolvent *debtors' Act, I presume an oath or affidavit of the truth of the suggestions disputing the debtor's schedule, was never required. Under the prison bounds' Act, it was required that there should be some showing of the truth of the allegation of fraud, to oust the commissioners of special bail of jurisdiction. But since the [*150

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one thousand eight hundred and thirty-eight, fraudulently conveyed his house and lot in the town of Columbia, in the State of South Carolina, to a person called in the deed Eliza Smith, or to some other person in trust for her, for the nominal consideration of three thousand dollars, when these relators believe and are informed, and so charge, that in fact, the said Eliza Smith had no means or funds to pay for the same; and the said house and lot are now held by her, or some other person in trust for her, to the hindrance and detriment of the creditors of the said Judah Barrett.

Fifth—Because that the said Judah Barrett, on the seventeenth day of May, in the year of our Lord one thousand eight hundred and thirty-eight, fraudulently conveyed certain negro or mulatto slaves named Ann, Mary, Josephine, Collins and Nicholas, and household and kitchen furniture, unto Eliza Smith, or to some other person in trust for her use and benefit, without valuable consideration, whereby the creditors of the said Judah Barrett are defeated and deprived of their just and legal claims.

Sixth—Because that the said Judah Barrett, on the thirty-first of July, in the year of our Lord one thousand eight hundred and thirty-eight, fraudulently conveyed a house and lot of land in the town of Columbia, in the State of South Carolina, situate on the east side of Richardson street, at the corner of Richardson and Plane streets, fronting on Richardson, measuring on the said street fifty-two feet, and on Plane street two hundred and eighty feet; also, another house and lot of land in Columbia, in the State aforesaid, on the west side of Richardson street, fronting on Richardson street, sixty-seven feet, running west on Assembly street, four hundred and seventeen feet, and fronting on Assembly street, eighty-seven feet: And also, another house and lot of land in Columbia, in the State aforesaid, situated at the corner of Assembly and Washington streets, fronting and containing on Washington street, two hundred and eight feet, and on Assembly street eighty-eight feet; and also, a large number of negro slaves, to his son-in-law, Jacob Cohen, without valuable consideration for the same, with the intent to delay, hinder and defraud the creditors of him the said Judah Barrett.

Seventh—Because that the said Judah Barrett has omitted in the aforesaid schedule, divers other property in his possession at the time of the filing of the same, both in the States of South Carolina, Mississippi, Alabama, Arkansas and elsewhere.

H. A. DE SAUSSURE, *Attorney for Relators.*

And the said Judah Barrett, by Wilson, his attorney, comes and defends the wrong and injury, when and so forth, and saith he is not guilty of the said several premises in manner and form as in that behalf as alleged against him, and of this he puts himself upon the country, and so forth.

And for further plea in this behalf, the said defendant says that the said several conveyances and deeds alleged to have been executed by the said Judah, in the 3d, 4th, 5th and 6th specifications above set forth, were not executed at any time within three months preceding the time of filing the petition of the said Judah for his discharge, under the Acts of the General Assembly made for the relief of insolvent debtors, and this he is ready to verify; wherefore, he prays judgment, whether the said relators ought to be permitted to proceed further as against him upon the said specifications, or any one of them.

WILSON, *for defendant.*

Act of 1833, that is not now required. Notwithstanding Mr. Yeadon objected that the suggestion was not sworn to, I ruled that the plaintiffs were properly before me and entitled to proceed. I refused to strike out any of the allegations of fraud in the suggestion. None of them seemed to me to be obnoxious to the charge of being "*frivolous*," and it is only for this cause that I should have been justified in striking them out. The special objections taken in the 6th, 7th, 8th, 9th, 10th and 11th grounds of appeal, to the sufficiency of the allegations of fraud, and the finding of the jury thereon, will be sufficiently understood by referring to the record. It ought, however to be remarked, that if these objections are of any value, they ought to have been taken by the way of special demurrer, and I presume the Court will be very well satisfied after verdict that enough appears on the record to show that the defendant is not
*151] entitled to the benefit of the Act. *In the course of the case, Mr. Cohen produced, under a *subpœna duces tecum*, the deeds to him. It was held that a witness so subpœnaed and attending need not be sworn, and that the papers must be produced. Having now disposed of the preliminary matters, I will, as well as I am able, state the case as it appeared in proof under the different heads of fraud. The second allegation in the suggestion was, that the defendant had in his hands a large sum of money, $21,650, not included in his schedule. It appeared (if the sale to Cohen was bona fide,) that on the 31st July, 1838, the defendant sold to Jacob Cohen, his son-in-law, his houses and lots in Columbia, (not before conveyed,) for the sum of $16,500, and sixteen slaves for $5,150. His letter to his creditors of the 1st of August, stated that he had made this sale to enable him to begin business again, and that for the lots he received $10,000 cash, and the balance was to be paid in two, four and six months, and that the price of the slaves was to be paid in sixty days. The defendant was unable to show what had become of this large sum of money (if, in point of fact, he ever received it.) His counsel contended that he had gambled it away. It appeared that when
*152] he engaged in gaming, he pursued it without *fear or judgment. I supposed, from the proof, that when once fairly embarked, he would have hazarded every thing he owned. It was proved by a man of the name of Davega, that the defendant gambled during the last races on the race course and in the gaming houses in the City, and lost considerably as Barrett said. He said the defendant had lived with him for the last ninety days, in the bounds, without any apparent means of defraying even ordinary expenses. He proved that defendant had *escaped*.

In the third allegation, the plaintiffs charged that the defendant had not embraced in his schedule large quantities of land and town lots in the south-west.

The evidence consisted of the defendant's written statements of entries and purchases of lands for himself and others. To the plaintiff, Sherman, as one of his co-partners, he stated entries and purchases to the amount of $80,100. To Dr. Wells he stated an entry or purchase of $1799, of which he, Wells, was to have one half of the profits.

The fourth and fifth allegations charged that the conveyance of a house and lot in Columbia, and nine slaves, to or for the use of his wife,

Eliza Barrett, or Eliza Smith, were fraudulent. *Under this head it appeared that Barrett, at or about the time of these conveyances, was indebted to the amount of $23,195. In his letter to his creditors of the first of August, 1838, which was a little subsequent to these conveyances, he stated that the proceeds of his alleged sale to Cohen, $21,500 would not pay his debts. [*153

The grantee, Eliza Barrett, or Smith, lived with the defendant from 1820. When their intercourse first commenced he was a married man. His then wife died at some time between '29 and '38. The conveyances were to Col. Chappell, as a trustee, for the use of Eliza Smith, and stated valuable consideration, but it was clear from the proof and the papers adduced that all these considerations might be referred to future or past cohabitation. The defendant, on the 6th December, 1837, drew an order on Stribling, for the payment of $45, rent to my wife, Eliza Barrett. While the defendant was absent at the west, he addressed letters to her as his wife, and in the name of "Eliza Barrett." He desired Coleman, as she was illiterate, to write replies for her, which he did. He asked her how he should sign the letters in reply. She replied, answer the defendant's letters, by which he understood her to direct him to sign her name as his wife, Eliza Barrett. He said the report was that they were married in North Carolina. On being asked by the defendant's counsel, whether he believed a marriage in fact had taken place, he said he did not.

John Shultz proved that the defendant asked him in December, 1836, to go to his house, to witness a conveyance to be executed by Eliza. He told him that they were married in North Carolina. When she was about to sign the deed, the defendant wrote her name Eliza Smith, and she made her mark. He said "you know what you promised me in North Carolina;" she said yes; he said, "you must stick to that." The defendant is a Jew, and Eliza Smith is not. Told the witness the reason why he wished to conceal his marriage was on account of his *faith*. Witness said it was a question with him whether they were ever married. In all the conveyances and mortgages made by the defendant she did not join or renounce dower. The defendant was in the possession of the house and personal property conveyed to her to the time of his removal to Charleston, which was in '38, I suppose about the date of his conveyance to Cohen; though it might *have been at an earlier day, for there was no certain proof in the matter. [*154

In the sixth allegation, the conveyances to Cohen were charged to be fraudulent. The proof was, that on the day when the deeds were executed, Cohen gave to the defendant a check; but the amount did not appear, nor did it appear whether it had or had not been paid. The value of the houses and lots conveyed, were proved by Gregg and McLaughlin, to be $36,500; they proved the rents to be less than 10 per cent. ($2,300,) but notwithstanding their unproductiveness was presented to their attention, they still asserted their value to be $36,500. These conveyances covered the whole remaining property of the defendant, except his interest in the western lands, and the property conveyed to his wife or concubine, which ever she may have been. Mr. Cohen was proved to be a man of good character. His means to make such a purchase was rather dubious. He had in his possession as

owner, a large rice plantation, (six hundred and fifty-eight acres,) and fifty slaves. The conveyances to Cohen were of the houses and lots in Columbia, already spoken of, for $16,500, and sixteen slaves for $5,150. The defendant, according to his letter at the date of these conveyances, owed more than $21,650.

The seventh allegation was a general one, covering pretty much, in general terms, the charges made in the second, third, fourth, fifth and sixth allegations.

The jury were instructed, first, as to the second allegation. If they believed the sale to Cohen to be *bona fide*, and that the defendant had received the proceeds, $21,650, to enquire what had become of that sum. They were told it was for the defendant to show this. This was attempted to be done by showing his reckless character as a gambler, and his gaming within a year previous to his application for a discharge. They were told that they might find he had gamed away $21,650 but I advised them that I thought the evidence hardly warranted the conclusion. I told them then that the effect of gaming within a year, would exclude the defendant from the benefit of the Act; but I said not to them, that it would have the same effect as a conviction of fraud. Indeed, upon Mr. Yeadon's requisition, at the close of my charge, I told them it would not have the same effect. If I said any thing like what is stated in the
*155] 13th ground, I have no recollection *of it. On the third allegation they were told that the proof was plain, that the defendant had an interest in western lands not included in the schedule. To understand the defendant's fourteenth ground, it is necessary to understand the course of the argument. I had decided that the defendant could not *now* amend his schedule. The defendant's attorney, in words, appealed from my decision to the jury, and contended that they were to consider the amendment as made. In commenting on this part of the case, I said the course pursued was a most unjustifiable one; my error, if I had committed one, was not to be corrected by the jury, but by the Court of Appeals. That they could not find upon facts which did not appear; and that there was no evidence that he had omitted the western lands through ignorance, inadvertence or mistake. On the fourth, fifth and sixth allegations, the jury were instructed that the limitation of three months in the prison bounds' Act, applied to the preference of one creditor to another, and not to fraudulent conveyances

As to the conveyances of Eliza Barrett, alias Smith, they were instructed that they could not be supported if she was the defendant's wife. They were referred to the evidence in this behalf, and they were told that on it they might find her to be his wife. In commenting upon the deeds, supposing her to be his concubine and not his wife, the distinction between a consideration arising from a past or future cohabitation, was carefully pointed out; and the jury were told, if the consideration of either or both the deeds was future cohabitation, then that one or both could not be supported. For Barrett had retained possession of the property up to a period when he was insolvent. If he had separated himself from the possession, then his gift of the personal property, if made when he was abundantly able to pay his debts, would be good. But this could not now avail, as the proof was clear he had the possession to May, 1838.

In reference to the deed to Cohen, they were told that if they believed the consideration, $21,650, was not paid, then they might find these deeds to be fraudulent. For they were conveyances of the debtor's most valuable estate, within his creditor's reach, on the verge of insolvency. These were, since Twine's case, regarded as strong badges of fraud. It might be, that comparing the price paid, with the value *of the property, they might with these other circumstances, find the conveyances to be fraudulent. Here, I suppose, is the alleged error complained of in the sixteenth ground. I did say to the jury, that they ought to rely on Gregg and McLaughlin's testimony, in fixing the value of the real estate conveyed to Cohen, at 36,500, although the rents do not amount to 10 per cent.; and I have yet to learn, both as a Lawyer and a Judge, that there is any error in believing respectable and intelligent men, acquainted with the property, although their estimated value should exceed a sum on which the annual rent was less than 10 per cent. [*156

The jury found against the defendant on the second, third, fourth, fifth, sixth and seventh allegations.

The defendant appealed, on the annexed twenty-three grounds:

1. Because his Honor, before issue joined on the suggestion, refused permission to the defendant to withdraw or discontinue his petition and schedule.

2. Because his Honor refused to continue the cause on the application of defendant, although it was manifest, from the face of the third count, that the defendant could not, by any human effort, have procured the testimony necessary to his defence against the allegations therein contained, between the day of the filing of the suggestion, January 16, and the days of the trial of the cause, January 31 and February 1, 1840.

3. Because his Honor, before issue joined on the suggestion, refused permission to the defendant to amend his schedule, by inserting therein an assignment of all his right, title, and interest in the property alleged by various counts in the suggestion to be held by fraudulent conveyances from the defendant; and especially because his Honor refused to allow the schedule to be amended in relation to the western and southwestern lands, alleged in the third count to be the property of the defendant, although it clearly appeared from the affidavit subsequently submitted to his Honor, and from the testimony of Mr. De Saussure, that the omission to insert these lands arose from ignorance or mistake on the part of the defendant.

4. Because his Honor compelled the defendant to take issue and go to trial on a suggestion unsupported by oath or affidavit.

*5. Because his Honor, before issue joined on the suggestion, refused a motion on behalf of defendant, to strike out the irregular, informal, and defective counts of the suggestion, and compelled the defendant to take issue on all of them. [*157

6. Because the second count is defective, in not alleging the time when the money alleged to have been received by defendant, was received by him, nor the person or persons from whom it was received, and therefore the count cannot support the finding of the jury.

7. Because the third count is multifold and voluminous, and blends various inconsistent and and alternative issues, and therefore cannot support the finding of the jury.

8. Because the fourth count shows on its face that the conveyance therein mentioned and alleged to be fraudulent, was made more than three months before the filing of defendant's petition for his discharge, and the finding of the jury thereon is contrary to law, and ought to be set aside.

9. Because the fifth count and the finding of the jury thereon, are also liable to the same objection.

10. Because the sixth count and the finding of the jury thereon, are also liable to the same objection.

11. Because the seventh or last count is informal, irregular and indefinite, and entirely too vague to support the finding of the jury thereon.

12. Because the finding of the jury on the second, is inconsistent with their finding on the sixth count, and a new trial, therefore, on both, should be awarded.

13. Because his Honor, it is respectfully submitted, erred in charging the jury that the limitation of three months, in the clause in the prison bounds' Act, applies only to assignments and payments to one creditor in preference to another, and not to fraudulent conveyances. Whereas it is submitted that the plain letter and meaning of the clause, show its applications to the latter as well as to the former, and the defendant's plea to that effect should have been sustained.

14. Because his Honor erred in charging the jury that it was questionable whether their finding that the defendant had lost the money alluded to in the second count, by gaming, within twelve months preceding the filing the petition, would not be attended with the same consequences of perpetual imprisonment and disfranchisement of insolvent relief, as a conviction *of fraud; whereas it is submitted that the conviction of loss of money by gaming within the inhibited period, would only submit the defendant to imprisonment, until payment of the debts for which he was arrested, or in other words, that it would only deny him relief in the particular case without payment of the money due; and operate no disfranchisement in other cases; and as this was a material point in the case, his Honor, (as he was requested to do,) should have so charged the jury.

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15. Because his Honor erred in charging the jury that they had no right to acquit the defendant of the charge of rendering a false schedule, on the ground that he had inadvertently, ignorantly, or by mistake, omitted to insert in his schedule the property alleged in the suggestion to belong to him.

16. Because his Honor erred in charging the jury that a bond or conveyance of property, in consideration of future cohabitation, made by one in good circumstances, would be void as against creditors, whose claims against the donor originated long subsequent to the bond or conveyance; whereas it is submitted that such bond or conveyance, under such circumstances, would stand on the footing of any other voluntary bond or conveyance, and would be valid against subsequent creditors.

17. Because his Honor erred in charging the jury that in estimating the value of the real estate alleged to have been fraudulently conveyed by defendant, they ought to rely on the valuation of the two witnesses, (Messrs. McLaughlin and Gregg,) who fixed the value at $36,000, but estimated the rent at the most, but $2,650, which showed their estimate to be not worth a straw, especially too, as one of them (Mr. Gregg,) admitted that he would not buy the property at his own estimate.

18. Because the multiplied and alternative charges in the third count, relating to the western and southwestern lands, were unsustained by the evidence, and because there was no proof whatever of fraud in the conveyances to Jacob Cohen, or those to Eliza Smith; but the proof, on the contrary was, that those conveyances were bona fide and for valuable consideration, and the verdict of the jury in respect to these conveyances, and in respect to the western and southwestern lands, ought to be set aside.

*19. Because his Honor charged the jury that there was sufficient evidence to authorize them to find that Judah Barrett and Eliza Smith were man and wife, whereas the plaintiffs themselves by both documents and witnesses proved the contrary to be the case.

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20. Because there was no proof whatever applicable to the seventh count,

and the finding of the jury thereon, having been entirely without evidence, ought to be set aside.

21. Because his Honor ruled that Mr. Jacob Cohen, a witness, served with *supœna duces tecum*, in behalf of the plaintiffs, should be compelled to produce the papers called for by the subpœna, without being sworn as a witness, although such papers were used to the prejudice of his rights.

22. Because his Honor erred in charging the jury that it was not necessary for them to believe, or for it to be proved, that defendant had been guilty of wilful and deliberate perjury, in order to convict that defendant of rendering a false schedule, and in refusing to charge the jury that such proof was necessary.

23. Because the verdict was, in other respects, contrary to law and evidence.

Curia, per O'NEALL, J. Where the grounds of appeal are not noticed in this opinion, they are considered by the Court as sufficiently answered, explained or ruled, by the report of the Judge below.

The third and fourteenth grounds may be considered together. For they both in fact relate to the amendment of the schedule. If the fourteenth ground was right, it would be no more than this: the jury would be permitted to make for the defendant, the amendment which he could not do.

This would be giving to them powers which I never supposed to rest any where. But, without wasting words about it, the rule may be stated at once, that the jury cannot inquire beyond the issue; that, in this case, was, is the defendant's schedule true or false?(*a*) The ground admits that it was, but insists that that which was false in fact, the jury should find true in fact. This they had no right to do. There is no doubt that the defendant's schedule is amendable within the discretion of the Circuit Court.(*b*) But I do not understand by discretion, when used as a law phrase, the power of doing as *the Judge's caprice may direct. He is invested with discretionary powers over many [*160 matters of practice, to subserve the purposes of justice. But in reference to the subject now before us, the discretion of the Circuit Judge was never intended to help a fraudulent debtor out of the meshes of the net into which either his fraud or folly may have cast him. Here I never could perceive that the defendant had "inadvertently, ignorantly or by mistake," omitted to insert in his schedule the property alleged in the suggestion to belong to him. To say that this was the fact, would be to say that a debtor did not know of what his estate consisted. He has, according to the verdict of the jury, left out of his schedule all of his most valuable property and rights. When detected in this, and he is about to be saddled with the consequences, he begs to be secured from them by amendment. It is true "that ceasing to do evil and learning to do well," in the sublime book of holy inspiration, with which the defendant ought to be acquainted, is the condition on which the penalties of the moral world are waived. But here, he who wilfully, or with the means of knowledge within his reach, does wrong, falls under that legal maxim, "*ignorantia legis neminen excusat*," and must abide the consequence. This is the case with the defendant. He made the issue, that he had presented a schedule of his whole estate; this was verified by the solemn sanction of his oath; if in fact he did not return a tithe of his estate, how can he complain, that this omission is set down to any thing else than

(*a*) 1 Rich. 463. *An.* (*b*) Ante 33. *An.*

ignorance of the fact? The predicate of the amendment being thus removed, the defendant has nothing to stand upon.

But, I go still further; an amendment ought never to be made when it will surprise or delay the other party. That was peculiarly the case. They had traversed the defendant's schedule, and specified its falsehood, and at the moment of trial, when they are waiting to prove their allegations, the defendant asks by amendment to destroy the whole issue. This is going to defeat the ends of justice, and cannot be allowed In general, a schedule is amendable where it is apparent that the omission resulted from "ignorance, inadvertence or mistake." The usual illustration is, where a man leaves out some trifling article of property, to
*161] which his attention *was not turned; in such a case, he may well be supposed to have accidentally omitted it.

To the fourth ground the following answer may be given: under the Act of 1833, (Acts. p. 43,) (*a*) if the defendant be "accused of fraud," it is to be tried by jury. (*b*) Whenever the right of a prisoner to be discharged is resisted, on the ground of fraud, there is nothing which requires that there should be any showing on oath. But still if the result of the allegation would be to delay the hearing of the debtor's application then I have no doubt that the Circuit Judge, in the exercise of a sound discretion, might require the creditor to verify his accusation by affidavits. If there was any merit in this objection, it ought to have been taken when the plaintiffs appeared before my brother Evans and objected to the defendant's discharge, and were permitted to file their suggestion. When the case was called for trial it was too late to make the objection.

The eighth and twelfth grounds may be considered together. The prison bounds' Act, in the 7th sec. (P. L. 457,) (*c*) provides that no prisoner shall be discharged "who shall have, within three months before his or her confinement, or at any time since, paid or assigned his estate, or any part thereof, to one creditor, in preference to another, or fraudulently sold, conveyed or assigned his estate to defraud his creditors." According to my reading, these two parts of the same sentence are distinct, and have not the same qualification of time. (*d*) The limitation of three months applies solely to undue preference. It was reasonable that there should be some limitation in this behalf. For a man might be allowed, at a period when insolvency was not apparent and manifest, to do an act which at a later day it would be altogether wrong to permit. But if a man sells or conveys his estate to defraud his creditors, his conveyance is most commonly inoperative, and the estate thus sold or conveyed, remains his against his creditors, and its omission in his schedule might, when he was wholly silent on the subject, subject him to the penalties of a false schedule: but where the conveyance might be good in the hands of the alienee, still the defendant has, in thus putting the property out of the reach of his creditors, been guilty of a fraud on them,
*162] which is equally criminal whether it be within *three months or at a more distant day. The concluding part of the section shows that this is the true construction. It provides "whenever a prisoner shall be accused by the plaintiff, or his agent, of fraud, or of his having

(*a*) 6 Stat. 492, § 1. *An.*
(*b*) *Blease* vs. *Farrow*, 9 Rich. 49. *An.*
(*c*) 5 Stat. 78. *An.*
(*d*) 7 Rich. 473; 2 Strob. 139. *An.*

given an undue preference to one creditor to the prejudice of the plaintiff, or of having made a false return, or of having gone without the prison walls, or prison rules, as the case may be, it shall be lawful for the Judge or Justice before whom the prisoner is brought, to direct a jury to be impannelled and sworn to determine the fact." From these provisions, referring to the former ones, being so perfectly distinct, we are very properly brought to conclude that a fraudulent sale or conveyance, and a fraudulent preference, are two wholly distinct things, and that the limitation of time was intended to attach to the preference of one creditor to another.

The fifteenth ground, as explained in the report, is without foundation. The instruction given by the presiding Judge to the jury, enabled them to understand fully the facts on which they were to pass and the law applicable to them.

If, in point of fact, Eliza Smith, or Barrett, was the wife of the defendant, then there was certainly no doubt that the deeds could not be supported. For in this point of view they were voluntary. That there was evidence that they were man and wife, cannot be denied, unless it be that acknowledgments of each other as such, and living together and cohabiting, be no evidence of such a fact; no one will hardly venture that far. That there was conflicting and opposing evidence, makes the very case to be resolved by the verdict of a jury. And if the case depended upon this question, I should say that they ought to be regarded as man and wife.

But if it is conceded that they never were married, and that Eliza was Judah's concubine, then I think the case is also free from difficulty. If the deeds were executed to procure a continuance of cohabitation, then it is beyond all doubt that they are void.(*a*) I think the evidence would even justify this conclusion. For the parties lived and cohabited together after the execution of the deeds, and had the common enjoyment of the property.

If, however, the deeds stand on the footing of voluntary conveyances to a kept mistress, as the counsel seems to *desire, still the verdict could not be otherwise than it is. That a man, not in debt, may [*163 do any act of folly he chooses, is generally unquestionable; and if that had been Barrett's position, these deeds might have been supported. But at every moment of time during his intercourse with Eliza, he was more or less in debt. He retained the possession of the property to the moment of acknowledged insolvency. How a voluntary conveyance, thus situated, is to be supported, I am at a loss to conceive.(*b*) Our cases as to the rights of creditors, as against voluntary donors, must all be wrong, or these deeds are void.

If it were true, as is contended, that the defendant made these convey- to Eliza, for her services as house keeper, or for any other debt, still his possession of the property would render the conveyances fraudulent.

The seventeenth ground cannot avail the defendant. For if Mr. Cohen paid the consideration acknowledged by Barrett, for the houses and lots and slaves, his deeds ought not to be regarded as fraudulent. Yet it may be, as the plaintiff alleged, that in fact no money was paid. In this respect, there was evidence from which the jury might have

(*a*) Harp. 201. *An.* (*b*) 2 Bail. 128. *An.*

concluded that the plaintiff's allegation was true, and if so, then the defendant is rightfully convicted of fraud under this head. If they were bona fide, the defendant had $21,650, their proceeds, for which he had failed to account, and in this respect he was guilty of having made a false schedule. The jury have found both that the deeds were fraudulent and that the defendant had the consideration, $21,650, which was omitted in his schedule. These are inconsistent findings. But reject either, and the defendant is convicted of fraud. It is, therefore, unavailing to the defendant. As to the western and southwestern lands, it was plain that these, to a large amount, were omitted in the schedule, and as to them, the falseness of his schedule was palpable.

In answer to the twentieth ground, it would be enough to refer to the return of the subpœna *duces tecum*. It does not require the person thus summoned, to testify, but to bring into Court a paper which the party needs. When this is done, nothing further is required. In the case of the *Treasurer* vs. *Moore*, (3 Brev. 550,) it was ruled that *164] before going into *trial, the plaintiff had the right to have a return made to the subpœna *duces tecum*. This shows that the party need not put the person so summoned on the stand as a witness.

The motion is dismissed.

The whole Court concurred.

Yeadon, for the motion. *H. A. De Saussure*, contra.

Note.—This case was argued before the present Reporter was elected, and postponed by the Court for further consideration, which will account for the omission of argument of counsel.

Robertson & Gilfillin *vs.* John Shannon.(*a*)

Defendant having about $4000, desired to invest it in cotton for speculation. He accordingly applied to the plaintiffs, who were cotton brokers in the city of Charleston, and they purchased for him 316 bales; procured an advance on their own responsibility of $12,470, to pay for the cotton so purchased; shipped it on board the Josepha, (a vessel designated by defendant,) and consigned it, according to the usages of trade, to a house in Liverpool. Subsequent to the sailing of the vessel, the defendant refused to complete the contract. Upon this refusal this action was commenced. Verdict for plaintiffs, $4000. *Held*, that the defendant was liable to the plaintiffs as vendors; that there was a sale and delivery; and a new trial was refused.

Before O'Neall, J., at Charleston, May Term, 1840.

This was an action of assumpsit, brought to recover the price of 316 bales of cotton, bought by the plaintiffs, as cotton brokers for the defendant.

The facts of the case may be stated as follows: the defendant being about to return to Ireland, and having about four thousand dollars, in

(*a*) S. C., again and again, 2 Strob. 419; 4 Rich. 323. *Irving, Sheriff*, vs. *Robertson*, 6 Rich. 228. *Am.*

money, wished to invest it in cotton. The plaintiff, Gilfillin,* was introduced to him, as a cotton broker, by Mr. George Cotchett, [*165 and his desire to purchase cotton stated. He and the plaintiffs were afterwards together at Martin and Walter's, and at James Adger & Co.'s, for the purpose of buying cotton; it was then stated in the presence of the defendant, by the plaintiffs, that an advance was to be procured, which, with the defendant's four thousand dollars, would enable them to purchase for him about three hundred bags. This arrangement Mr. Walter thought he (Shannon) understood. Mr. Cotchett thought when he saw him and the plaintiffs, that he hardly understood it. The plaintiffs negotiated for, and obtained the advance. The defendant was not known in that part of the transaction to Trapman or his agent, Wortherspoon, who made the advance. The party making the advance contracted for the freight. The plaintiffs, for the defendant, and in his presence, bought three hundred and sixteen bales of cotton; their credit was alone looked to for the payment; and the cotton delivered to them by Martin & Walter, and George Cotchett, for James Adger & Co. The defendant said he was going to ship the cotton by the barque Josepha, in which he had obtained his passage, and that he was "going to go with the cotton." The cotton was shipped from the 19th to the 23rd April, 1839. The defendant was alongside the Josepha while the cotton was going on board. Along side of the vessel he was informed by Gilfillin, that if he was not disposed to take the whole venture, he could get another person to take one hundred bags; the defendant replied he would take the whole for luck. The captain signed, on the 23rd of April, a receipt for the cotton shipped by Robertson & Gilfillin. On the 24th, the bill of lading was forwarded; (hence, I inferred it was signed on or before that day;) which set out the shipment by the plaintiffs to Coleman & Stotleporth, the correspondents of Trapman, who made an advance of about three-fourths of the price of the cotton, (twelve thousand four hundred and seventy dollars.) This was according to the course of trade, according to which (said the witness,) the bill of lading is made out in the name of the shippers, and consigned to the correspondents of the house making the advance. The invoice discloses the name of the owner, for whose ultimate benefit the shipment is made. An invoice was sent on, and Mr. Wortherspoon's correspondence stated John Shannon to be the owner. The first advance was made before *Wortherspoon, the agent for Trapman, knew of any misunderstanding having arisen between the plaintiffs and defendant. He [*166 offered to take one hundred bags of the venture, and so did Mr. Kerr. Cotton continued to improve in price until about the sailing of the vessel, 12th of May. The cotton went forward to Stotleporth. It seemed, from the proof, to be the usage of trade, that cotton on which an advance was made, was pledged, 1st, to the party making the advance; 2nd, to the shippers for any thing due to them by the owner on account of it. On the 20th of April, the plaintiffs paid Martin and Walter, four thousand dollars in cash, and on the 24th or 25th, three thousand seven hundred and sixty-eight dollars more, and to Adger & Co., the money for the purchase from them was subsequently paid. On the 23rd of April, the defendant refused to comply with his contract, and the plaintiffs made an affidavit to hold him to bail for the whole amount of the purchase of the cotton.

He was arrested and went to jail on the 24th, where he has ever since remained. The plaintiffs offered to credit the defendant with the proceeds of the cotton in Liverpool, but this was refused. There were sundry special counts in the declaration; but I thought the whole case depended upon the questions whether the plaintiffs had sold the cotton to the defendant; and whether they had paid money for his use; and that, therefore, the counts for goods sold and delivered, and the money counts, covered the whole case.

The jury were instructed in conformity to the opinion of the Appeal Court, on the former trial of this case.

They were told, that to entitle the plaintiffs to recover, as vendors of the cotton, it must appear to their satisfaction that the cotton was delivered to the defendant. This, I thought, was abundantly shown in the shipment, and his knowledge of, and assent to that fact. Although this was my opinion, I did not state it to the jury, but referred them to the facts which had led my mind to that conclusion.

They were also told, that to entitle the plaintiffs to recover on the money counts, it was necessary that they should be satisfied that the plaintiffs bought the cotton for the defendant, that they were bound to pay for it, and that they had paid money before suit brought. They were told that the four thousand dollars, paid to Martin & Walter, was such a payment as would, to that extent, entitle the plaintiffs to recover, if it was true that they bought the cotton for the defendant, and were *167] bound to pay *for it. I said to them, in this connection that for the money advanced by Trapman, they were liable, as the parties procuring it, and if the cotton did not sell for enough to reimburse him, they must make it good; and hence, that whether they paid that sum out of the money advanced by Trapman, or out of their own funds, was perfectly immaterial. For it was their money in either point of view.

The jury found for the plaintiffs four thousand dollars, and the defendant appeals, on the annexed grounds:

1. Because his Honor erred in charging the jury that Robertson & Gilfillin were liable to Trapman for the ultimate refunding the amount advanced by him, whereas, in fact, they were only agents of Shannon, and having fully disclosed their principal, were not personally bound, unless they made some new contract not connected with Shannon.

2. Because he stated to the jury, that it was immaterial whether the money paid to Walter was plaintiff's money, or had been advanced by Trapman, in anticipation of his advance of three-fourths of the purchase.

3. Because the Court expressly charged, that the special counts were unnecessary, as the plaintiff must recover, if at all, on the other counts. Whereas, it is contended, that the counts for refusing to complete the contract, are the only ones supported by the evidence.

4. Because the verdict is not supported by the evidence, and was arbitrary, as defendant, if liable at all, was liable for the whole, and by necessary implication, proves that the plaintiffs did not make out a case entitling them to recover at all.

5. Because the true cause of action was the refusal by defendant to complete the alleged contract, after which the agency of plaintiffs terminated, and they were only entitled, if at all, to damages for the refusal to pay the cash part of the purchase.

A. G. Magrath, for the motion, said—The plaintiffs cannot recover, either upon

the counts for goods sold, the money counts, or the special counts. They are not vendors. Shannon is not a purchaser. The statute of frauds is in the way. The plaintiffs cannot prove a contract, as is required by its terms. There is no pretence that there was *an earnest* paid, *nor is there evidence of a *memorandum.* [*168
The question then is, whether there was a delivery to Shannon. Delivery under the statute must be such as to make the vendee the owner; to give him power to control the property. 1 Comyn on Con. 91.

There is no evidence of such delivery here. Where is the evidence of Shannon's right? He never could control this property. It never was in his possession. Suppose the cotton had arrived in Liverpool, Shannon could not have supported an action against the captain or owner for the possession, or even for the damage, if any had been sustained. He had neither bill of lading, nor any other evidence. To presume a delivery in this case is within all the mischief laid down in *Cooper* vs. *Elston*, (7 T. R. 14.) McIntyre never was his agent, nor were Coleman & Stotleporth. These all represented Robertson & Gilfillin, not Shannon. Not one of these parties have ever recognized Shannon as their principal. How then can it be said the delivery to them was a delivery to Shannon? Nor can the verdict be sustained under the money count. There is no evidence of money paid at *his request.* This is important. This may be implied, but not so in this case. No circumstance exists here to presume or imply *this request.* Even the $4000 is not money paid *on request.* There is no case where the count for money paid can be supported, where the party who sues for the money retains also the goods for which he claims to have paid money. Robertson & Gilfillin kept the goods and the money. The proper evidence of payment of money in this case, would be the payment of money, and transferring the property to Shannon. But so long as they kept the cotton and refused to deliver, they could not sue for money paid. And moreover, to make Shannon chargeable, under this count, it must appear that the money was paid under a certain contract, the terms of which have been performed by them. Now, the question is, whether these parties have not violated their contract; and they have not shown this, which is the point in issue.

If the plaintiffs cannot recover upon the general counts, can they recover on the special counts? The 2nd and 3d special counts allege delivery, which we contend is not proved, and therefore they must fail. The first special count alleges only the purchasing of cotton at the request of Shannon, *and his promise to pay. [*169
But, where is the evidence of this? There has been no evidence whatever of the whole contract. The consent of both parties to the contract is necessary to make it binding. And the conduct of the parties at the time when the dispute arose, proves that this was not the contract; it was not the understanding of the parties; and this is the essential feature in every contract. All inferences are here excluded, because the conduct of the parties is so plain that it makes positive evidence. So that there is no evidence whatever to support even the special counts.

But the rights of the parties result from their legal positions at the time of the quarrel between the plaintiffs and the defendant. If they were principal and agent when Shannon quarrelled with them, this was repudiating their agency. It was there terminated. Their agency then ceased. But although this is so, still they continued to conduct themselves as if they were authorized agents. So far then as regards these parties when they quarrelled, Robertson & Gilfillin should have at once terminated their agency. They could not be agents against the consent of Shannon. Had they sold the cotton in Charleston before the vessel sailed, there would have been no loss. The sales of cotton here would have more than paid all losses and expenses. This was the prudent course, and this is the course they were bound to pursue, under the rule that the agent must act most to the benefit of the principal. All the loss here was caused by the misconduct of Robertson & Gilfillin, and this they cannot claim against Shannon.

Yeadon, contra. Counsel have brought the prisoner before the Court, to excite the sympathies of your Honors. The defendant is suffering by his own folly and faithlessness. The condition of the plaintiffs is equally deserving of sympathy. Defendant was not contented with buying what his money would afford, he goes to plaintiffs and buys, through them, thousands more.

All advancements were obtained through the plaintiffs. Plaintiffs acted in good

faith throughout the whole transaction. Plaintiffs acted according to the usages
*170] of merchants. Mr. *Y. contended that the verdict was properly rendered on the counts for goods sold and delivered.

If the money had never been paid by plaintiffs, it cannot be doubted but that the original sellers might have maintained this action for the cotton. Plaintiffs have placed themselves in the shoes of the original sellers. 1 Chitty's Plead. 5; 2 Liv. on Agency, 120; 2 Esp. N. P. 493; Cited also, opinion of the Court in the former case. The Court decided that the money counts could not be supported, but that they might recover on the counts for goods sold and delivered.

The Court of Appeals laid down the principle on which the case was to be decided, and the Circuit Court so instructed the jury, and they found accordingly.

Plaintiffs are charged in the books of the first sellers as the principals. Plaintiffs credited the defendant, and became thereby vendors. Was there a delivery? Signing the bill of lading was a delivery, and enough to divest plaintiffs of all right, except the right of stoppage of the goods *in transitu*. 2 Term. Rep. 71; also 2 Liv. Ag. 110. Under the usages of trade, defendant could not have the bill of lading. 1 H. Blackstone, 364.

By the usages of trade, the moment the bill of lading is signed by the captain, the right of property vests in the consignees in Liverpool, and they could maintain an action against the carrier for loss or damage.

The delivery to captain McIntire, was a sufficient delivery; and I contend that the captain was the agent, and so soon as this delivery took place, plaintiffs were divested of any further control over the cotton. Defendant's act was indispensable to again take possession of the cotton. It was shipped for the benefit of defendant, and he could maintain trespass for the cotton, if the plaintiffs had taken possession.

Plaintiffs are entitled to sustain the verdict upon the counts for money paid, laid out and expended. Plaintiffs paid $4000 for defendant, at his special instance and request, and this was sufficient to support the counts for money paid, laid out and expended.

Mr. Memminger, on the same side—said, none of the parties concerned in the
*171] transaction could have disposed of this *cotton but defendant. Defendant was only bound to discharge the pre-existing liens. He had the resulting interest. The other parties had no right in law.

When the contract of agency was determined by defendant's repudiating the contract, defendant was bound to put the plaintiffs in *statu. quo*—place them just as he found them, by refunding the amount advanced by them for him. Cited 11 Johnson, 439; 7 Cranch, 500. *Agent against principal.*

Hunt, in reply, contended that there was a difference between a broker and a factor. Cited 2 Barn. & Ald. 142, 193; 1 H. Blac. 360, 365; 15 E. 62.

Curia, per O'NEALL, J. This case has been twice tried, and, in my judgment, is about as plain a case as ever was presented to a Court and jury. It is susceptible of two views: 1st, either the plaintiffs bought the cotton for, and delivered it to Shannon, thus making a sale of it by them to him; or, 2d, they bought it for him and paid for it in the whole or in part. In either of these points of view, it is a case of facts merely; and the only inquiry would be, do the facts justify either of them? That the plaintiffs bought the cotton for Shannon, and at his request, is unquestionable. It was proved by Walter and Cotchett, from whom it was bought. Was it delivered to him? About that, it seems to me, there can be as little question. He designated the vessel in which it was to go, (the barque Josepha,) in which he had taken his own passage; the captain of the Josepha said that the plaintiffs shipped the cotton for the defendant; he, the defendant, was along side, when it was going on board; and when one of the plaintiffs said to him that another person

was willing to take one hundred bags, he replied, "he would try the whole for luck." He did not object until the whole cotton was on board, and then indeed he refused to comply with his contract.

If these facts do not prove a delivery, then I confess I cannot say what could prove it. But here it is said the defendant did right in refusing to comply with his contract, inasmuch as by the arrangements made by the plaintiffs, he had not the control of the cotton. This is a mere specious presentation of a defence, which cannot be sustained. The defendant had not quite money enough to buy one-fourth of the *cotton which he desired. To obtain the quantity bought, an advance had to be procured by the plaintiffs. This was stated [*172 to him; and after the finding of the jury, we must take it he fully understood it. According to the course of trade, fully proved in both trials, the cotton is shipped in the name of the person making the shipment in fact, and is consigned to the firm in England who are the correspondents of the party here making the advance.

The shipment thus made is to pay, first, the advance; second, the charges of the shippers, if any; and the balance to the real owner. His name does not appear in the bill of lading, but in the invoice accompanying the cargo.

In this way, the rights of all parties are secured. All these things were done on this occasion. There is, therefore, nothing in this matter which can discharge the defendant. It is, however urged, that when the defendant refused to comply, the plaintiffs ought to have sold the cargo here, and thus a loss would have been prevented. It would be enough here to say, they had discharged their duty, and the cotton was at the defendant's risk. They had procured or contracted for the advance $12,470; they had bought the cotton for, and delivered it to him. Their power over it, except to send it forward according to the course of trade was ended. The defendant, if he had thought proper, could have had the entire control, by paying the whole price of the cotton; or if he had paid the difference between the advance and the price, he could have gone on with the cotton; and in Liverpool, he would have received the proceeds, after paying the advance, the freight, and the shipper's charges. That he did neither of these, is the defendant's misfortune; it is that which deprives him of liberty, and which will deprive him of the earnings of his life. Looking at the case as a sale by the plaintiffs to the defendant, they ought to have had a verdict for the whole price of the cotton, $16,294; but the jury for the present might suppose that the cotton in Liverpool did not quite cover the advance, (for Mr. Worthington said the sales were not equal to it,) and deduct on that account $12,294, which would leave a balance of $4,000 the amount found by their verdict This would still leave the defendant liable for any sum which the plaintiffs may be compelled to pay to Trapman on account of the advance, after deducting from it the *nett sales in Liverpool. [*173 But concede that the jury erred, and that the plaintiffs were entitled to receive $16,294, and they are content with the verdict of $4000, surely the defendant ought not to complain. Consider the case, however in the other point of view. The plaintiffs were mere brokers; they bought the cotton for the defendant at his request. The persons selling it would not sell to Shannon; they sold to the plaintiffs, and

charged them with it. They had no claim whatever on the defendant. Here, surely it cannot be denied, that money paid by them, on this account, was money paid, laid out and expended for the defendant, and at his request. For the obligation was incurred for him, and they were legally liable to pay for him. It is the common case of two persons going into a store, one of them wishes goods, the merchant will not sell to him; the third person says, let him have them on my account; it is done, and they are charged to the third person, and his liability to pay is beyond all question, and certainly when he does pay, he can compel the party to whom the goods were delivered to pay him. Indeed, I think, notwithstanding the former opinion in this case, that when it was shown here, that the plaintiffs bought the cotton for the defendant, that the venders refused to credit him, and charged it to them, that this was as much a payment for his use, as if it had been made in gold or silver. But that is not necessary for this case, and I only state the position that that opinion may not even impliedly have my sanction. To pay for the cotton, the plaintiffs applied to Trapman for an advance, and got $12,470. This did not pay for the cotton by $4000. They had previously paid this last sum. If even the 12,470, could in any shape be regarded as Shannon's, they had the right to say that sum is to be applied to the balance still due for the cotton, leaving the $4000 previously paid by them unsatisfied, and for it they were entitled to a verdict. But in point of fact, the money got from Trapman was a loan to them secured by their principal's cotton. For Wotherspoon, Trapman's agent, said I did not know Shannon in the transaction, further than that the plaintiffs were buying the cotton for him, and would pledge it for the repayment of the advance. This, by the usage of trade, they had a right to do. If the principal's cotton paid the advance, it was very well; but if not, the
*174] parties procuring it must, as a matter of course, pay any *deficit. Considering the case in this way, it is perfectly immaterial whether the money paid by them was from their own or borrowed funds; still it was paid by them, and they are entitled to recover.

The motion is dismissed.

BUTLER, EVANS and EARLE, JJ., concurred. GANTT, J., dissented.

EDWARD BARNWELL *vs.* JOHN MAGRATH.

The erection of a gate across a way, claimed by the plaintiff, which is opened and shut at pleasure by all who pass, is not such an obstruction as would have the effect to extinguish the plaintiff's right, or of barring him of his remedy, however long it may have been erected.

Before O'NEALL, J., at Charleston, May Term, 1840.

This was an action on the case, for obstructing the plaintiff's right of way, leading from his farm along the line of the defendant to the Ship Yard creek.

In 1794, Col. Shubrick, who was then the owner of most of the land

and lots, which he had laid out as the village of Belvidere, and John Edwards, Henry Grant, and Thomas Simons, who then owned the three lots now composing the defendant's farm, agreed to shut up all the streets which had been laid out, and to open the street, or road, leading from the public road to the Ship Yard creek. This road is designated in all the deeds by which the defendant's and the plaintiff's land was conveyed. In the deed to the defendant, the road is referred to as his boundary, and called a public road. From the Charleston road to the boundary of the defendant's land, there is no doubt the road is public, (although it was not *worked by the commissioners of cross roads,) both from the original dedication, and the subsequent public use of it. But [*175 from the boundary of the defendant's land to the Ship Yard creek, the way is private. It was used by Edwards, Grant and Simons, and those claiming under them, and by Mr. Johnson and Mr. Glenn, under whom the plaintiff claimed. As far back as the witnesses could remember, more than forty years ago, a gate was erected, and has ever since stood across the road. Mr Johnson, one of the former owners of the plaintiff's land, used the road from 1821 to 1825; but at and during that time, he had the use of the defendant's farm, by the consent of Mr. Fitzsimons, its then owner. Mr. Glenn, who succeeded Mr. Johnson, used it for two or three years, as a matter of right; his right to so use it was then denied, and then he applied to, and obtained permission from the defendant, to use it. In 1829, the defendant put up the gate complained of as an obstruction, at the place where it had formerly stood. This gate, and the other which preceded it, were fastened with a latch. It is a great convenience to the plaintiff to pass through the gate to the defendant's landing on Ship Yard creek. He was allowed to pass until he claimed it as a matter of right; the gate was then shut and locked. This was shortly before suit.

The case was submitted to the jury, and they were told that there was no doubt about the original dedication of the road to the public; but the public had not used that part from the defendant's gate to the Ship Yard creek That portion of it was made private by the erection of the gate, and the use of it exclusively by particular persons. The plaintiff could not claim the way by use. For Johnson's use was in the defendant's right as well as his; Glenn's use was for so short a period that no right could thence arise. That the plaintiff must stand upon the defendant's deed as a concession of the way in 1828; but in '29, the defendant's gate was erected, and if the jury believed that that was an appropriation by the defendant of the way to himself, and a denial of the right of others to pass over it, then, I thought, and so said to the jury, that after four years from the erection of the gate, the right of way was gone. For after that time the remedy by action was gone. The jury found for the plaintiff the way, with a gate in it, and $12.84 damages.

*The defendant appeals,

1. Because there was no evidence to establish either a public or private [*176 right of way. That as to the public right, the evidence proved that there was no dedication to the public; and as to the private right, there was no evidence of grant, prescription, or necessity.

2. That the evidence was clear, of a continued obstruction for the period of

forty years, or upwards. And there was no proof of use by any person adversely to the parties through whom the defendant claims.

3. That the plaintiff was barred from recovery by lapse of time.

4. That the verdict was, in other respects, against law and evidence.

A. G. Magrath, for the motion, said: A new trial must be granted, as there is nothing upon which the verdict can rest. There is no right of way, neither public nor private. It is not a *private* way. There is no grant of it as such. If the grant or deed between Shubrick and the other land holders, occupants of the property now owned by the defendant established anything, it establishes a *public* road. There is nothing in the deed to support the claim for a private way. Nor can the parties claim the right by prescription. Prescription for a private way, requires, 1st, private and exclusive right: 2d, twenty years adverse possession. (1 Bail. R. 342.) It supplies a grant, and is the effect of use and time, (2 Thomas' Coke, 233.) There is no evidence of either of these requisites. Is the road public? It is claimed by the deed; but the deed cannot make the road. The use consecrates the right proposed by the deed to be given, (2 Bay, 287.) Besides the intention to give, there must be evidence of acceptance. A dedication to the public must be proved. Dedication is a thing distinct from the deed. It is additional. Here, there is no evidence of dedication. The road never was used. From the earliest period the obstruction was there. This, of itself, repels the presumption of dedication. Any circumstance will rebut it. As erecting a bar, *Roberts* vs. *Kan*, (1 Campb. 262; 3 Saunders, 175, note E.) So far from there being ground for presuming dedication, the presumptions are quite the contrary.

*177] *What evidence is there, that any act was ever done under the deed, to make this a road? None. The earliest evidence is that which rebuts the idea of a road. Lord Kenyon had said in *The Reyly Charity* vs. *Merriweather*, (11 East, 375,) that the use for six years proves the dedication. There is no such proof here.

Where has Barnwell attempted to show the use of the road by those through whom he claims? All who preceded him used the road not as a *right*, but as a *favor*. Such a use never gives *right*. The use must be adverse.

But, even admitting a right originally, has it not been interrupted or abandoned more than twenty years? If the right ever was in him, it is gone. (15 Mass. R. 125; 1 B. & P. 400; *Yard* vs. *Ford*, 3 Saunders' R. 174, note 2.) Non-user, coupled with the assertion of a right to intercept the user, for more than twenty years, will extinguish the claim. As to the statute of limitations, four years have elapsed since the obstruction, which is the cause of action. The plaintiff is consequently barred of his remedy. As far back as 1829, the defendant asserted his exclusive right against the then owner of Barnwell's land, and forty years and more have elapsed since the obstruction. No evidence that at any time the obstruction was not there. This case is then clearly within the mischief of the statute, as well as within its letter and equity.

But, it is said the deed of the defendant calls for this road as a boundary. Does this amount to more than that in 1829 the defendant agreed to open the road? But he did not open. He refused to dedicate; of course no right vested in any one. (2 Bay, 287; 1 Campb. 262.)

McCready and *Mazyck*, contra, said that a right of way was a hereditament. Cited, 2 Brev. Dig. 21, 22; 3 Kent 359; 2 Ev. Po. 136.

Curia, per EARLE. The verdict of the jury has established, that the plaintiff had a right to the private way which he claimed. It is not material to the determination of the question, made on the motion for a new trial, to inquire how the right was first acquired. The agreement between Col. Shubrick, under whom plaintiff derives title, and the three persons

*178] who then owned the premises now held by the defendant, first *gave rise to the way in question; and is supposed to have been a dedication of it to the public. But as the attempt to build up the village of Belvidere proved abortive, there was no public to acquire the right of

way there, by actual use, which was confined to the covenanters themselves, and those claiming under them. The use was strictly private, and seems to have been continuous for more than twenty years. The land on which the way lies, belonged to Shubrick. It is not the case of a private way over another's land, and of an obstruction by the owner. Shubrick dedicated the way, or granted the right to use it, to Edwards, Grant and Simons, from whom the defendant derived title, and to all others, as the street or road of Belvidere. The plaintiff derives title from Shubrick, to a portion of the same lands, composing Belvidere, to which the way was appurtenant, and may be said, therefore to have the right of way, by express grant, or by necessary implication. We cannot suppose the absurdity in a legal point of view, that Shubrick, by granting to others a right of way, should deprive himself, and those holding under him, of the right to use the way.

The defendant's title deeds and accompanying plats demonstrate, not only that the way is not over his soil, but that the existence of it has been admitted by those under whom he claims, as well as by himself. The Court is therefore satisfied there is abundant evidence to sustain the plaintiff's right of way.

This right, however, is supposed to have been extinguished by a long continued obstruction, and as the defendant's gate was put up on the way in 1829, which was an appropriation of it to himself, and a denial of a right to others to pass over it, that the plaintiff's right of action was likewise gone. No doubt a right of way may be extinguished in several modes; and especially the erection of a permanent obstruction, which necessarily hinders the exercise of the right, would operate to annihilate it.(*a*) How long such an obstruction must be permitted to exist, in order to raise a presumption that will overthrow the right, or lose the remedy by action, we need not consider. The only question on this part of the case is, whether the erection of a gate across the way, which is opened and shut at pleasure, by all who pass, is such an obstruction as would have the effect to extinguish the right of way; and we *are [*179 clearly of opinion that it is not. It is a modification of the right, which may be prescribed; but it is not an obstruction that prevents or hinders the use of the way; and, therefore, however long continued, would not have the effect of extinguishing the right, or of barring the remedy.

In *Capers* vs. *Wilson*,(*b*) Mr. Justice Nott expresses a doubt whether a gate of that kind would be such an obstruction as would give a right of action. We think, therefore, that the verdict is right, and the motion to set it aside is refused.

The whole court concurred.

See *State* vs. *Peters*, 7 Rich. 393. *An.*

(*a*) See 3 Strob. 226; 6 Rich. 298. *An.* (*b*) 3 McC. 174. *An.*

M. Thomas *vs.* J. D. Yates.

Where a Sheriff has collected money under execution in favor of the plaintiff, and before a demand is made on him by plaintiff to pay over the money, he receives written notice from the attorney of certain attaching creditors not to pay over, but to retain the sum collected in his hands—that they intend to file a suggestion to set aside the plaintiff's judgment and execution, as fraudulent and void. *Held*, that the Sheriff was legally justified in retaining the money.

If there are are conflicting claims to money collected by a Sheriff, and he receives notice and acts fairly and bona fide in the matter—does not use the money himself, but deposits it in bank to await the ultimate decision of the Court—he does not subject himself to the penalty of the Act of 1796.

The Act of 1796, (5 Stat. 284,) is somewhat penal, and should be construed with strictness in favor of the party to be affected by it.

A Sheriff is bound to show, where he is sued under the Act, that he has acted fairly and in good faith, and that the money has not been detained for false purposes.

Before Earle, J., at Charleston, May Term, 1839.

Debt for the penalty of 50 per cent. on the sum of $2,238 18 cents, collected by the defendant, on an execution in favor of the plaintiff, and not paid over within ten days after demand. The execution of the plain-
*180] tiff against John Aitkin, *was lodged 31st January, 1837. The money was made on 6th February, 1837. Demand, in writing, by the plaintiff, on the 14th March, 1837, and again, on 25th October, the same year. The defendant refused to pay the money. Other demands were made on the 25th, 30th, and 31st October, and on the last day a bond of indemnity was tendered. The writ, in this cause, was lodged the same day.

The defence was, that the sheriff was justified in withholding the money, in consequence of certain proceedings at law and in equity. A notice, in writing, by Bailey & Dawson, attorneys for certain persons, was served on the defendant, on 7th March, 1837, directing him not to pay the money to the plaintiff, but to retain the same in his hands, as they intended to file a suggestion of fraud. Writs of attachment, at the suit of several persons, among them, Hugh Blair, against John Aitkin, were lodged on the 6th February, 1837, the sheriff summoned as garnishee. On the 10th June, 1837, there was an order obtained for leave to file a suggestion of fraud on the plaintiff's judgment. The suggestion was filed on the 1st January, 1838; on which there was no further proceedings. On the 20th March, 1837, a bill was filed by John S. Bird, against Aitkin, Thomas, and the sheriff, to set aside the plaintiff's judgment, and for an injunction to restrain the sheriff from paying over the money. But no injunction was then obtained, or applied for. But at January term, 1838, a decree was pronounced by Chancellor Harper, vacating the judgment, which, on appeal, was reversed in February, 1839. On 3d March, 1838, an order was granted by the Chancellor, that an injunction issue to restrain the plaintiff from proceeding at law; and directing that the money should be invested by consent of parties. On 19th March, 1838, it was paid to the Master, and afterwards paid by him to the plaintiff's attorney, by order of the Appeal Court.

On 8th January, 1838, there was a rule on the sheriff, to show cause

why he had not paid the money; rule made absolute on the 13th January, 1838; but the order reversed at the next sitting of the Appeal Court. On 15th January, 1838, there was notice of the filing of a supplemental bill.

I thought it clear, that the notice by Bailey & Dawson, on 7th March, could not protect the sheriff. If it could, a mere verbal demand, or assertion of right, by a third person, *must have the same effect. [*181
The order for leave to file the suggestion, of the 10th June, was not accompanied, as usual, by order restraining the sheriff from paying the money. And although a bill was filed by a person, claiming to be interested, on 20th March, 1837, to set aside the judgment, and for an injunction; yet no application was made for an injunction, and, of course, none was ordered, until 3d March, 1838. But the sheriff's liability had been incurred long before, and the action was brought 31st October, 1837. It was too late then to save the sheriff from the consequence of his former neglect. The jury was charged according to these views; and under the instructions of the Court, they found for the plaintiff half the amount which he was entitled to receive on his execution.

It was objected, that the judgment was not produced in evidence; I thought that unnecessary, and overruled the objection.

The defendant moves to set aside the verdict, on the accompanying grounds.

1. That the notice of the intention of the attaching creditors of John Aitken, to file a suggestion to set aside plaintiff's judgment and execution, as fraudulent and void, followed up by the actual filing of such suggestion, (such notice having been served on the sheriff prior to plaintiff's demand,) legally justified the sheriff in retaining the money, until the question of fraud was decided; and his Honor erred in charging the contrary.

2. That the filing of the bill in Equity, within ten days after the plaintiff's demand, by the creditors of Aitken, against plaintiff and others, to set aside plaintiff's judgment against Aitken, as fraudulent, and to restrain the sheriff from paying over the money to plaintiff, the sheriff having been made a party defendant to the said bill, also legally justified the sheriff in retaining the money until the question of fraud was decided; and his Honor erred in charging the contrary.

3. That the lodging of the attachment of the attaching creditors of Aitkin, with the sheriff, while the goods and chattels of Aitken were in possession of the sheriff, and were yet unsold, by virtue of the levy under plaintiff's execution, with a view to make those goods and chattels liable to the attachment, also *justified the sheriff in retaining the money, until an adjudication of the [*182
matter.

4. That the statute on which the action was founded, is a penal statute, intended only to apply to delinquent sheriffs, wilfully or corruptly withholding money from plaintiffs entitled to it, and ought to be constructed strictly; and the sheriff in the present case, having retained the money only in consequence of the proceedings at Law and in Equity, above stated, having, in the meantime, made no use of the money, but kept it in bank, and having ultimately paid it into the Court of Equity, by consent of all parties, (the present plaintiff included,) was not delinquent within the meaning of the statute, and liable to its penalty; and his Honor erred in charging the jury that the sheriff was liable to the penalty, although his conduct was neither wilful nor corrupt.

5. That the plaintiff's proof was defective, no evidence having been offered of the judgment of the plaintiff *vs.* Aitkin, alleged in the declaration, and his Honor erred in charging the jury that such proof was unnecessary.

6. That the verdict was, in other respects, contrary to law and evidence.

Yeadon, for the motion, cited 2 Faust, 87, A. A. 1796; and said penal statutes were to be construed strictly. *Thomas* vs. *Aitkin*, Dud. Rep. 292. This is a case of penalty, and not one of stipulated damages. No injury had been done on the part of the defendant. A. A. 1839, 58, 63d sec.

Hunt, contra, cited, 1 Brev. 200; P. L. 110; Bac. Abr. Tit. Exon. letter A.; Dudley, 292. The decree of the Appeal Court in Chancery is retrospective, and shows that defendant, Yates, acted wrong.

Pettigru, in reply, cited 1 Bail. 437; 2 Bail. 16; *Potts* vs. *Richardson;* Cooper, 255; Douglass, 519, 522. If one receive satisfaction after the forfeiture, he never can recover the penalty. A forfeiture once barred, is barred forever, 2 B. and Pull, 346; 5 Term Rep. 636; Bac. Ab. Tit. Damages, letter D.; Coke upon Litt. 258, letter A.; Coke Eliz. 561. A penalty cannot be incurred where the act is lawful. Defendant was a stakeholder.

*183] *Curia, per* BUTLER, J. This action was brought under the following clause of the Act of 1796; 5 vol. 284, Stat. at large; "That the sheriffs be, and they are hereby required, to pay over to the plaintiff or his attorney, all and every sum or sums of money which they may respectively receive on account of such plaintiff, within ten days after he shall receive the same, any law, usage or custom to the contrary thereof, in any wise notwithstanding; and if any sheriff shall refuse to pay over the same within ten days after he shall receive the same, if demanded, then, and in that case, he shall be liable to forfeit and pay to such plaintiff, the sum of fifty per cent. on the sum so received, to be recovered by action of debt; and the respective courts out of which the executions may issue, shall be, and they are hereby, authorized and required to make such rules and orders as they may judge necessary, to carry this Act into effect."

At the time the money was demanded of the sheriff, in this case, by the attorney of plaintiff in execution, he had deposited the exact sum in bank, and was ready and willing to pay it over to either of the parties claiming it, when their respective claims should be settled by the Court. He did not wilfully withhold it for his own use. Under a notice from the attaching creditors of the defendant in execution, as stated in the report, he kept the money to abide the judgment of the Court. Ultimately, the Court of Equity took jurisdiction of the matter, and the money was paid to the master, to be invested by the consent of parties. The circuit Chancellor decided that the plaintiff was not entitled to the money, but that it rightfully belonged to the attaching creditors, on whose account the bill had been filed This decree was set aside, and finally the money was paid to and accepted by the plaintiff. The question now arises, was the sheriff, under these circumstances, fairly liable to the penalty of the above Act? That he acted in good faith, I think, is unquestionable, and that he had the sanction of a Chancellor for what he had done, is equally true. But it is contended that these afford no justification for disregarding the provisions of the statute, which gives the sheriff no option or discretion after money is demanded of him by the plaintiff on record or in an execution; but that he is bound to pay it over to such plaintiff, or subject himself to a liability to pay fifty per cent.

*184] notwithstanding other claims *may be asserted to the money, which the sheriff may think, in good faith, are better than the plaintiff's. The effect of which might be, in many cases, to give a fraudulent plaintiff a right to recover fifty per cent. when in fact he was not

entitled to the money in the sheriff's hands. To give this strict and severe construction to the statute, would be to give it an operation frequently revolting to justice, and inconsistent with the intent of the Legislature. The practice of the courts since the enactment of the statute, does not sanction such a construction. Where there have been adverse claims to money in the hands of the sheriff, collected on execution, it has always been the practice for him to hold it subject to the order of the Court; and it has not been unfrequently the fact that the money was ultimately paid over, not to the plaintiff in execution, but to another having the right to it; and this, too, without any compulsory process from a court, requiring the sheriff to keep the money till the claims to it are settled. Indeed, according to the construction contended for, such process, injunction from Chancery, or an order from the Court of Common Pleas, would be unavailing, as the Act says the money must be paid to the plaintiff in execution, any law, usage or custom to the contrary thereof notwithstanding. In fact, the practice of the courts may be regarded as founded on their own rules in relation to the liability and duty of sheriffs. Where a sheriff has collected money on a *fi. fa.*, he is not bound to pay it over to the plaintiff in such *fi. fa.*, if there are *fi. fas.* in the office against him; but the sheriff is justifiable in retaining and paying to the *fi. fas.* against the plaintiff, the money collected on his account. *Nunar* vs. *Gray*, (1 Bail. 440.) In the case of *Potts & Ioor* vs. *Richardson*, the money was raised on plaintiff's execution, and it was held that the sheriff was not only justifiable in not paying it to the plaintiff, but that a party who claimed under an assignment of an older judgment was not liable to refund it. Nor could it have been contended that in the above cases the sheriff had incurred a liability to pay fifty per cent. to plaintiff, on whose executions he had collected the money. And yet, according to the literal construction of the Act under consideration, such would be the case; for it is said that no law or usage should be allowed to interfere with the rigorous and inexorable operation of the Act. The Act is somewhat of a penal character, and *should be construed in reference to the mischief intended to be remedied, and with [*185 strictness in favor of the party to be affected by it. Where the sheriff has money and wilfully refuses to pay it over to a party unquestionably entitled to receive it, he is fairly liable to the penalty The Act intended to impose on him a penalty for wilful delinquency. Not to allow him to hold money for his own use, after another had acquired a clear right to demand it. It certainly never could have been the intention of the Legislature to punish a sheriff who had acted in good faith towards all parties who claimed money in his office. As between a senior and a junior execution, it is frequently very difficult to decide; the greatest judge cannot do it without full investigation. A sheriff, a mere ministerial officer of the Court, has the right to ask the instruction of the Court in all honestly controverted claims against him; and when he acts in good faith, he should not be subjected to forfeitures that were intended for the wilful defaulter. Good faith should be the criterion of his conduct. It will not do to say that the sheriff may evade the provisions of the statute by fictitious controversies for money in his hands, procured and connived at by himself. They would be too easily detected, to be resorted to with frequency. Indeed, the sheriff ought always to be held

liable under the statute, unles he can show that he acted in good faith to all the parties in controversy. And if the defendant in this case acted in bad faith towards one party, with the view of giving the other an advantage, he might be held liable. But this question was not submitted to the jury, and I think would have been of little avail if it had been. Still it is a question which may be submitted to another jury; and I will not say what should be their verdict. The sheriff occupies a very important position to the parties who claim money in his hands, and has it in his power by his own election to prejudice their rights, and I think he is under the highest obligation to act in such a way as not to do one party an irremediable injury, by giving the other an undue preference. Like every stakeholder who is disposed to act justly, he should, under such circumstances, hold his hand. This is presented in a striking point of view by Lord Mansfield, in one of his remarks in the case of *Drinkwater* vs. *Goodwin*, 255, Cooper. "The maxim of law which says it shall not be in the power of any man, by his election, to vary the rights
*186] of *two contending parties, is a very wise maxim, as well as a very fortunate one for the parties who are so disputing; because by giving notice to such person to hold his hand, and offering him indemnity, he renders himself liable to the true owner, if, after such notice, he takes upon himself to decide the right." I do not undertake to say that the sheriff may not have been justified in paying to the plaintiff the money when demanded. But, I do say, he should not be punished for holding in the money from either, until the controversy between them was settled. I think the defendant's motive was good, and so far from his conduct being reprehensible, it received the sanction of Chancellor Harper, whose decree should be regarded as a virtual protection for the defendant. When the Chancellor took cognizance and jurisdiction of the matter, his decree should be considered as acquitting the defendant of all wilful wrong, and rescuing him from legal liability. For suppose the circuit decree had been affirmed instead of being reversed, would it be pretended that this action could have been maintained? I apprehend not, for it would be monstrous to conclude that one party could recover under the statute of '96, while the other party was rightfully entitled to the fund in controversy. It cannot be that the frequently uncertain result of a vexed and conflicting demand against the sheriff, should determine his liability. This would place the sheriff in a position of perilous responsibility. Two parties, for instance, a senior and junior execution creditor, might make a demand and bring actions under the statute at the same time; the matter might be litigated through all the Courts, with various success, one Court deciding one way, and another the other. And yet it is said the sheriff would be liable to the successful party, because he did not, in the first instance, without information, give a preference to one of the parties. That is, the sheriff would be required to make decision, without argument or investigation, on a point upon which the Courts could not agree. The thing runs itself down into an absurdity. The sheriff must always act in good faith when he withholds money from contending parties, and when he is sued, it will be incumbent on him to show this, or to abide the consequences. I suppose that there cannot again be any difficulty under the Act of 1796, as the Act of

1839,(*a*) on the same subject, is more explicit in its *provisions. This opinion confirms the true meaning of this latter Act, which may be resorted to as in some measure declaratory of the former. [*187

The motion for a new trial is granted.

The whole Court concurred.

See 2 McM., 155; 2 Rich., 528, 531; 10 Rich., 120. *An.*

THE STATE *vs.* CLAUS VON GLON, JUN.

Any trading with a slave, without a permit from his owner or employer, in buying or selling, for cash or on credit, for much or for little, is an indictable offence, under the Act of 1817.

Before RICHARDSON, J., at Charleston, January Term, 1841.

This was an indictment, under the Act of 1817, for illegal trading with Somerset, the slave of —— Beckley. The evidence (see my notes) proved that Somerset often bought small articles at defendant's store, as 4*d* or 7*d* worth of coffee or sugar for cash, or credit, &c. (B. Reeding's testimony.)

I charged the jury, that such trading came within the prohibition of the Act—buying from or selling to a slave, were equally forbidden—the object was to prevent all and any trading.

The jury returned a verdict of guilty, and defendant appeals.

1. Because the Judge charged, that the sale for cash, of any article, however small, to a slave, came within the prohibition, and subjected the party to the penalty of the law; whereas, it is contended, that the law only prohibits purchasing, either for money or goods, articles from a slave—and the simple retail of a few cents of groceries for cash, is not illegal.

*2. The evidence established only that the defendant had, at times not stated, retailed small articles from his store to Somerset, the slave of the prosecutor, in the same way as to other persons, to the amount of four pence or seven pence at a time. There was no proof that he had ever bought anything. [*188

Hunt, for the motion, cited A. A. 1817, p. 25,(*b*) and said that the whole purview of this Act was to prevent buying from a slave, and was never intended to prevent any thing but purchasing corn, rice, &c.

He contended that the words trading and trafficking were put in opposition with buying.

Bailey, Attorney General, contra, submitted the case without argument.

Curia, per O'NEALL, J. The point made in this case was decided by the Constitutional Court, at Columbia, Fall Term, 1818, in the case against Suber, and has ever since been regarded as settled. If, however, it was open for argument, it is plain that under the words of the Act, any trading with a slave, without a permit from his owner or employer, in buying or selling, for cash or on credit, for much or for little is an indictable offence.

The motion is dismissed.

The whole Court concurred.

(*a*) 11 Stat., 38, § 63. *An.*

(*b*) 7 Stat., 454. *An.*

*189] *THE STATE *vs.* JOHN H. BOISE and DEIDERICH STUKE.(*a*)

A count for felony, and a count for a misdemeanor, may legally be joined in the same indictment.

Motion to quash an indictment, made before RICHARDSON, J., at Charleston, January Term, 1841.

The indictment charged the defendants, in the first count with a larceny, and in the second count with receiving stolen goods of some one unknown. I held these counts inconsistent *per se;* the one being a felony, and the other a misdemeanor; and whether both offences arose out of the same act or not, was immaterial. For instance, assault and battery could not be joined with a count for murder, although arising out of the same act. The rules of pleading did not admit of such a distinction; and I accordingly quashed the indictment.

The Attorney General appealed from the order of the Court quashing the indictment in this case, and moves that the same may be rescinded, and the case reinstated on the docket for trial, on the ground:

That a count for a misdemeanor may be regularly joined with a count for a felony in the same indictment; and that such joinder is no ground for quashing the indictment, if both counts relate to the same fact, or the same transaction.

Bailey, Attorney General, for the motion, cited Rice's Rep. 431; *The State* vs. *Gaffney;* 1 Chitty's Crim. Law, 253, 254; and under these authorities, contended that a count for a misdemeanor might be joined with a count for a felony in the same indictment. No injury could result to the defendant by coupling two counts. He would not be confused in his defence.

Kunhardt and *Yeadon*, contra, cited *The State* vs. *Smith*, 1 Rice's Dig. 309; 3 T. Rep. 102. By joining two counts, the defendant's right of traverse is taken away. *190] The evidence would be confounded. A felony and a misdemeanor *cannot be united in the same indictment. The privilege of challenge, they contended, would be taken away from the defendant. If he is compelled to go to trial, he must prepare for both offences, although distinct, at the same time. That repugnancy was fatal in an indictment; and two repugnant charges cannot be sustained in the same indictment. It was, they contended, a matter of discretion for the Judge below. In the course of their argument, they cited 1 Chitty's Crim. Law, 208; 1 Rice's Dig. 390.

Curia, per EARLE, J. The rule in England in regard to the joinder of offences is, that a felony cannot be joined with a misdemeanor, in the same indictment. The reason which is assigned for this, that the defendant would thereby lose the benefit of having a copy of the indictment, a special jury, and of making his full defence by counsel, has no application at all in this country; on the contrary, the defendant would gain by being indicted for felony, as he would have the right of challenge, in addition to the other privileges, which are equally secured to all defendants, in criminal prosecutions. From analogy to the rule of pleading in civil actions, I suppose that whenever the same plea may be pleaded, and the same judgment given, the offences may be joined. No doubt two felonies may be joined, so far as regards the objection in point of law, as matter of form. And so of several misdemeanors. (3 T. R. 98.) And by the English practice, larceny and receiving stolen goods may be

(*a*) Same parties in next case. *An.* And in 2 McMort., 252.

joined, 1 Cr. Ca. 234. But here the receiving is charged as a felony. A case is cited by Mr. Rice, in his Digest, tit. Indictment, 52, *State* vs. *Smith*, MSS. where it is said there is a repugnancy in charging a felony in one count and a misdemeanor in another, which would be fatal. But, if fatal at all, I suppose it would be so on demurrer, or in arrest of judgment; and yet the judgment there was not arrested, although the defendant was convicted only of the receiving. Since the Act of 1829, subjecting the receiver to the punishment of whipping, and that of 1834, imposing the same punishment for grand larceny, the Act of 1833 having abolished branding. I can perceive no greater incongruity or repugnancy in joining larceny and receiving stolen goods, in the indictment, than there is in joining any other distinct offences, where *the same judgment must be accorded. It is true, the offences are [*191 technically of different natures. One is a felony, and the other a misdemeanor. A second conviction of the former would be capital; but as the formality of praying the benefit of the clergy on the first conviction, is wholly dispensed with, and the punishment of whipping is peremptorily substituted for branding, whether clergy be prayed or not, the offences are so far assimilated, that the technical objection which prevails in England, to their being joined, does not exist here.

We differ, therefore, with the Circuit Court, in the reason given for quashing the indictment, that the counts cannot legally be joined. We think that they may be joined, but leave it to the direction of the presiding Judge, in all cases, so to regulate the trial that the party shall not be prejudiced by the joinders. As other indictments have been given out and found, we do not consider it material to make any order.

O'Neall, Evans, and Butler, JJ., concurred, Gantt, J., dissented.

See *State* vs. *Posey*, 7 Rich. 485; Chivis, 105; 3 Hill, 1.

The State *vs.* John H. Boise and Diederich Stuke (*a*)

The confession of a clerk, in the absence of his employer, that he had sold wine to a servant girl, is not evidence to charge the employer; and a new trial will be granted to the absent defendant, without prejudice.

Before Richardson, J., at Charleston, January Term, 1841.

This was an indictment for selling wine to Matilda, the slave of B. F. Dunkin. Stuke was the clerk of Boise. The evidence must be referred to for the details. But it appeared, that Stuke was asked if he had not sold a bottle of wine to a negro girl, that morning, and he replied, yes. But, soon afterwards, having conversed with two men in the yard, he re-*turned and said, "no—no, I forgot." Boise was sent for, and [*192 claimed the shop. Mr. Dunkin had before come in with Matilda, asked her where the wine had been bought, and she pointed out the place. He then went for a search warrant—returned and then found

(*a*) Same parties next case above; and in 2 McMort. 252. *An.*

Boise present. Mr. D. told him, Boise, his clerk had admitted he had sold a bottle of wine to his servant, this morning—upon this, Stuke said, "no, no— I spoke too quick."

I charged the jury that they were to decide, 1. Whether there had been any illegal trading. If any, 2. Who had done it, Stuke, or Boise, or both defendants. 3. That the confession of Stuke, made in the absence of Boise, could be evidence only against himself—not Boise. 4. That the jury were to decide, from all the circumstances of the case, whether Boise had, or had not, authorized the illegal trading alleged to have been done by his clerk, Stuke. And, if he had done so, he might be convicted—but otherwise, not to convict him.

It will be seen, by the evidence, that there was adduced against Boise scarcely any thing to implicate him in the particular trading; but that he was master of the shop. The jury returned a verdict of guilty, and the defendants appeal.

GROUNDS OF APPEAL.

1. That the allegation in the indictment was, that the defendants sold a bottle of wine to Matilda, the slave of B. F. Dunkin, and the proof merely that Stuke, (the clerk) confessed that he had sold a bottle of wine that morning, (his principal being absent at the time of both the sale and the confession,) to a negro girl, or a servant girl, without in any manner indicating whose, or what negro, or servant girl; and his Honor erred in charging the jury, that they could convict the defendants on such evidence; and the finding of the jury is unsupported by the evidence.

2. That there was no evidence at all to convict the defendant, Boise, there having been no proof at all to connect him with the selling by his clerk in his absence; and there being no proof at all of any selling, save the clerk's confession, subsequently retracted, and afterwards denied in the principal's presence; and the finding against the principal was in violation of the cardinal principle, *193] that one man cannot be convicted *of an offence on the mere confession of another, and that only of his own guilt.

3. The verdict was, in other respects, contrary to law and evidence.

Kunhardt, for the motion, contended that the mere confession of a party of his guilt should never be given in evidence against a third person. The confession of Stuke, he argued, did not come up to the allegation in the indictment, but he argued that the proof should correspond with the allegation.

Bailey, Attorney General, contra, asked whether the Court would interfere and set aside the verdict of the jury; where there is no misdirection of the Court. He contended that juries might weigh all the circumstances, as well as the words. 1 Phil. Ev. 76, 77.

Curia, per RICHARDSON, J. In this case, we think that the defendant, J. H. Boise, ought to have a new trial, without prejudice. And it is, so ordered. But the motion on the part of D. Stuke is dismissed.

The whole Court concurred.

*194] *HARRIS, Administrator, *vs.* DAVID CLAYTON.

Goods distrained by a landlord for rent in arrear, and replevied by the tenant, (although they may be removed to other premises,) are liable first to the *lien* of the *Retorno habendo cum fi. fa.*

The lien of a distress warrant upon goods replevied, is never lost; neither does it give place to any other. The sale of the goods is merely suspended, in order to try the question whether the rent is truly in arrear.

Before RICHARDSON, J., at Charleston, January Term, 1841.

This was a rule on the sheriff, to show cause why he should not be attached for contempt, in not paying over to the plaintiff the money made under the *Retorno habendo cum fi. fa.* in this case.

The sheriff showed for cause that there were prior executions in his hands, against the defendant, which he was advised were *prior liens* on the fund, and he was unwilling to pay over the money to the plaintiff without an order from the Court.

I was of opinion that the sheriff, having levied under the *Retorno habendo cum fi. fa.* on the individual goods which were the subject of the original distress, although the goods had in the mean time been removed to other premises, the lien of the plaintiff was restored by relation, and he was entitled to the money against prior executions, I therefore made the rule absolute, and the sheriff appeals, on the annexed ground:

That the prior executions in the sheriff's hands were entitled to the money as *prior liens*, and his Honor should have discharged the rule.

Yeadon, for the motion, contended that where goods had been distrained, and the tenant had given bond, and the goods were replevied, the landlord lost his lien upon them; and in support of this proposition, he cited 2 Dallas, 68; *ib.* 131, *Fry* vs. *Leper;* also, Brown's Cases in Chancery.

Lesesne, contra, cited 4 McCord, 496, and under this authority contended that by replevying, the lien of the landlord *was only suspended, not entirely gone. Cited also, 6 Bacon Abr. 67. [*195

Curia, per RICHARDSON, J. Harris, the landlord, distrained the goods of his tenant, Clayton, who replevied them, and of course gave bond and securities for their return, &c. if the rent proved to be in arrear.

The verdict upon the replevin, found the rent claimed by Harris, the avowant; and the *Retorno habendo* was properly levied upon the goods replevied, and still undisposed of by the tenant, although removed to other premises. In the mean time an execution of *fi. fa.* had been lodged with the sheriff. This was prior to the *Retorno habendo*, and such an execution has a lien upon all the goods of the defendant not otherwise pledged.

Does this general lien give place to the particular lien of the distress warrant, upon the goods so replevied? is the question for the Court. It is admitted that if the goods had in the mean time been distrained, upon other premises, for other rent; or if Clayton had sold them, while legally in his hands, then the lien of the distress warrant would have been lost, (2 Dallas, 68; Brown's Chancery Cases, 428.) The tenant would have

broken his bond of replevin, and the sheriff must have returned *Elongata sunt* to the *Returno habendo*. And, in that case, the avowant must have resorted to the execution in "*Withernam*,"(*a*) to take other goods; or else, the replevin bond being thus forfeited, must sue the tenant and his sureties upon it. But when, as in this case, the sheriff returned to the avowant's execution, that he found the replevin-goods just where they were placed, and ought to be, in the hands of the tenant, the landlord had no other remedy, but to sell the goods to pay the rent. As between the landlord and tenant, the lien of the distress warrant was never lost. The sale of the goods was merely suspended in order to try the question, whether the rent had been truly in arrear; and the moment that was established, both parties stood in *statu quo*, practically, as they stood before legally, but in abeyance, waiting for the decision of that fact.

The doctrine of distress for rent, with the right of replevin, followed by the reason of the peculiar execution of *Retorno habendo*, and that of *Withernam*, in the case of eloignment of *goods, plainly indicate
*196] that the lien of the distress warrant renders it plain that both the *Retorno* and the *Withernam* go upon the assumption of such a continued lien. The question then is, upon the priority of the two executions, the one a specific, the other a general lien and prior.

As a test, let us suppose that there had been no distress warrant for the rent, and the *fi. fa.* had been levied upon such goods as were subject to be distrained; in that case, the rent now acquired, must have been paid before the *fi. fa.* under settled law. (*DeLiesseline's* case, 4 McCord, 496.) And the only difference is, that the *Retorno habendo* has been levied upon such such goods of the premises, but which had been lawfully removed by suspending the distress warrant, in order to try a supposed violation of law, in making the distress. In such case, no general lien, which is of course subject to prior and specific liens, can deprive the landlord of his specific and vested lien upon the particular goods he had distrained.

It would seem, too, that the sheriff having found the very goods undisposed of by the tenant, nor eloigned by any act of his, the *Retorno habendo* could not but be returned satisfied; and of course they, the sureties to the replevin bond, who undertook that the goods should not be eloigned, were ipso facto discharged from their obligation by its fulfilment; and then, of course, the landlord would be confined to his remedy against the tenant.

The Court therefore affirm the Circuit decision.

The whole Court concurred.

See 3 McC. 43. *An.*

(*a*) 2 N. & M. 444. *An.*

*John Horlbeck, survivor of Henry Horlbeck, *vs.* Benj. [*197 F. Hunt.

After the statute has run out, there must be "an express promise to pay, or an admission of a subsisting debt which the party is willing and liable to pay."
Whether the acknowledgment proved is sufficient to take a case out of the statute, is a question for the Court, and not one of evidence or construction for the jury.

Before Richardson, J., at Charleston, January Term, 1841.

This was an action of assumpsit upon an account for work and labor done and materials furnished, &c., between the years 1820 and 1830. The defendant pleaded *non assumpsit*, and the statute of limitations. The account was proved; and the case turned upon the question, whether the defendant had acknowledged and assumed to pay the debt within four years before the action had been commenced. The account had not been presented until 1840.

Peter Horlbeck, the son of Henry Horlbeck, was offered as a witness, to prove an acknowledgment, &c., by the defendant. He was objected to, and released his interest in the case, (see his release;) and, on his *voire dire*, swore, that he had sold out his interest in the estate, and had no further interest but in the debts. Upon this, the Court ruled that he was competent to give evidence.

He was then sworn in chief, and testified as follows: Witness presented the account early last year, and defendant said he would revise it. Early last summer, say two or three months after witness had called, he called again. Defendant said he had revised the account. Said he could not pay it now. If it had been presented eight years ago, he could easily have paid it. That circumstances had altered with him. That he could not pay. It would have to come in with his other debts. Witness told him they wished to close the books, and if he would settle by note, or bond and mortgage, at any time convenient to himself, it would answer. Defendant declined entirely to give any obligation; say any thing of the kind—as bond, note, &c. Defendant and witness were alone. A gentleman was in the next room. The door had been closed by the defendant. Defendant did not object to any item. Thinks defendant had the account in his hand. Said he was sorry it had not been presented before. He made no objections* to witness. Thinks he said he presumed it was right, or something of the [*198 kind. He said it would come in to be paid with his other debts. Witness was authorized to make the offers he did by plaintiff. A letter was written by Dr. Horlbeck. Can't say why the account was not presented. His brother was a student with the defendant many years ago. He is now upwards of thirty years old. Plaintiff was indulgent to his debtors; or negligent perhaps. Difficult to get accounts from him.

Cross-examined—Defendant said he could not pay the account now; but said something of presuming it was right. Did not say he had examined it. It must come in with his other debts. Declined giving bond or note. That he could not pay it; it must come in with other debts. Can't say if he did or did not say that he would not come under obligation. Understood him to admit the debt; but spoke of his inability to pay. Gave no reason for not giving a note, that witness recollects. Has stated defendant's words as well as he recollects.

The plaintiff's counsel argued, that, although there had been proved no express promise to pay the account, after the statutory bar had become complete, yet the acknowledgment proved was sufficient to take the case out of the statute.

I charged the jury, that before they could find for the plaintiff they must be satisfied, (the statutory bar being complete,) that the defendant had promised anew, to pay the account. That the action in such case must be bottomed upon the new promise; the old debt being the con-

sideration. Such an action could not lie, without some new undertaking on his part; and that it must amount to the expression of a willingness, and a liability still to pay the debt, which had been barred. The jury had, therefore, to decide whether the evidence proved such a promise, or not; and to find accordingly. They found for the plaintiff, and the defendant appeals on the following grounds:

1. That the witness, Peter Horlbeck, was directly interested in the event of the suit, and, therefore, incompetent; and having been objected to, ought not to have been admitted to testify.

2. That there was no evidence of any acknowledgment by the defendant, of
*199] any subsisting legal liability, nor any promise *to pay, but on the contrary a positive refusal to incur any obligation; and there was nothing, therefore, to take the case out of the operation of the statute of limitations; and his Honor ought so to have charged.

3. That the construction of the words alleged to have been used by the defendant, was a question of law for the Court, and not of fact for the jury; and his Honor erred in leaving the question to the jury, but should have charged directly, that they were not sufficient to prevent the bar of the statute.

4 That the verdict is without evidence, against evidence and directly contrary to the settled law.

Bailey, for the appellant, on the first ground, cited 1 Phil. Ev. 53, and contended that the witness, P. Horlbeck, had a legal interest, and was an incompetent witness. Cited 2 Starkie Ev. 734; 1 Phil. Ev. 49, 50, 52; and 1 Bail. Rep. 362; *Pickett* vs. *Cloud*.

On the second ground, he cited and relied on 2 Bail. 278; Dudl. 118; and Chev. Rep. 33, and contended that the ground of recovery is an express assumpsit; but he denied that there was, in this case, any promise or undertaking (from the testimony) to raise even a presumption of a promise to pay.

On the third ground, Mr. Bailey contended that it was a question of law for the Court, and not such a question as should be decided by, or left to, a jury.

Yeadon, contra—first ground—said, that if the witness, P. Horlbeck, had a legal interest, he would admit that he was not a competent witness, but he contended that he had not such an interest as would exclude him from testifying; that he was not, in any event, liable for costs in this case. That this was not one of the specific debts, in which the witness had a legal interest.

On the second ground, he cited also, Dud. Rep. 118, and 2 Bail. 188, contending, at the same time, that it was not necessary, in order to take a case out of the statute of limitations, that there should be an express promise, but that a subsisting debt, with slight evidence, would take the case out of the statutory bar. Mr. Yeadon contended, further, that the statute of limitations never was intended to
*200] protect against a just debt, *but an unjust or antiquated claim; cited 2 Starkie, 894. The testimony does amount to the acknowledgment of a just and subsisting debt. 2 Starkie, 893. Note from 4 East, 492.—Where one admits a debt to be due and just, he must prove that he utterly refused to pay, or the presumption arises that he promised to pay. He also insisted that if the expressions were ambiguous, they should go to the jury to decide; and he contended that in this case the defendant did use ambiguous words; cited 2 Starkie, 895, note A; 2 T. Rep. 760; 8 E. Common Law Rep. 317; 6 *Ib.* 447; Chitty on Contr. 611, note. "If the words express ambiguity, they may properly go to the jury, and they may decide." 2 M. & P. 583.

Rice, do. From the commencement of this account up to the case of *Young* vs. *Mompoey*, in 1830, it required but very slight evidence to bar by the statute of limitations. He cited Chitty on Conts. 627, and contended that the statute of limitations did not discharge the debt, but was only a bar to the remedy—the lien still existed. 2 Bail. 283 and 425; 2 Hill, 326; Chitty on Contr. 642, were referred to. Mr. Rice said, that from the testimony, there was no ground or reason to suppose that the defendant denied the debt, and refused to pay it; but that he

pleaded his inability, clearly intending that plaintiff should receive a dividend of his property. Cited Leigh's N. Prius, 1258; 1 (Wheaton) Selwyn, 142.

Bailey, in reply, said that defendant had refused to incur legal obligation, and again contended that the witness, P. Horlbeck, was an incompetent witness, either from feeling or the pecuniary interest which he had in this case; that he was entitled to a share of the personal estate not yet collected, and was also liable for his share of the costs of this suit. Mr. B. referred to *May* vs. *Hancock*, (*a*) decided in Columbia, May, 1829.

Curia, per O'NEALL, J. This is another of the many cases depending upon the rule in *Young* vs. *Monpoey*, (2 Bail. 278. It has been followed by so many cases, and with such uniformity, that it cannot now be shaken, *by even a case of more than ordinary hardship.* It is only necessary to state the rule, and see how this case is effected by it. After the statute has run out, there must be "an express promise to pay or an *admission of a subsisting debt which the party is willing and liable to pay." On the present occasion, there is no pretence that [*201 there was an express promise to pay. What is meant by the admission of a subsisting debt, which the party is willing and liable to pay? I think Judge Johnson, in *Young* vs. *Monpoey*, (2 Bail. 280,) gave a very happy illustration of what is meant. He said "if there be an unequivocal admission, that it is due and unpaid, unaccompanied by any expression, declaration, or qualification, indicative of an intention not to pay, the state of facts on which the law implies a promise, is then present and the party is bound by it." This illustration was further explained and enforced in *Reigne* vs. *Desportes*, (Dud. Rep. 118,) which declared the old debt to be the consideration, and the new promise the cause of action. Taking either or both of these, it is apparent that the promise here is not sufficient. It admitted the old debt to be due and unpaid, but it was accompanied by a plain expression that the party did not intend to pay, when he said "he could not pay," and when he declined the very liberal offer to settle by note or bond on his own time. Let it be tested by asking where is the new promise on which an action could be sustained? It cannot be contended that it is found in the admission of a debt, of which the defendant says "if it had been presented eight years ago, I could easily have paid it. Circumstances have altered with me. I cannot pay. His other observation, "it must come in to be paid with my other debts," is all which remains. But that is no undertaking to pay it. It is simply saying it must stand as it is, and take its chance for payment with my other debts. The true mode, however, of arriving at what the defendant meant, is to take the whole conversation, and when we do, we see that while the defendant admitted that the debt once was due, and might once have been paid, that now he declined to admit either his liability or willingness to pay.

The case of *Hughes* vs. *Hughes*, (Cheve's Rep. 34,) was a stronger admission than that which is relied upon here, and yet the bar of the statute was there allowed.

In *Lowrey* vs. *Dubose*, (2 Bail. 425,) the promise was in writing, endorsed on the note "this note was given in swap of horses, which (if admitted, though out of date, and sued in Sumter district, shall never

(*a*) MS. See 1 Rice's Dig. 303, § 47; 204, § 35.

be pleaded in court, as I take no advantage of the Act of Limitations."

*202] The conditions *contained in this promise were complied with, and it was held to take the case out of the statute. That was a plain admission of a subsisting debt, which the party admitted he was willing and liable to pay, notwithstanding the statute. From the conditions he probably intended to endeavor otherwise to defeat the payment. But there was no refusal of payment accompanying the promise, and therefore that case cannot help the plaintiff.

It has been said the admission proved here, was ambignous, and that therefore the jury might well conclude that it was equivalent to the legal requisition. But I hold, as it was ruled in *Trammell* vs. *Salmon*, (2 Bail. 308, 310, 311,)(*a*) that whether the acknowledgment proved is sufficient to take the case out of the statute, is a question of law for the Court, and not one of evidence or construction for the jury. Any other rule will destroy the whole force and uniformity of the rule settled in *Young* vs. *Monpoey*, and will present the very state of non certainty which that rule was intended to remedy. One kind of acknowledgment will do before one jury, while a different one will be required by another. This must not be. I perceive the late decisions in England, under Lord Tenterden's Act, by leaving the construction of written promises to the jury, are literally repealing the statute. This consequence there will prevent us from following. Our course is settled. We shall adhere to the rule in *Young* vs. *Monpoey*, in all cases, and shall consider that its application belongs to the Court and not to the jury.

The motion for a new trial is granted.

The whole Court concurred.

See 6 Rich. 27, 219; 3 Rich. 287; 4 Strob. 220; Dud. 118; 2 Bail. 310; 3 Hill, 223. *An.*

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*203] *A. OLIN *vs.* FIGEROUX & CHAMPY.

Defendants purchased from plaintiff a box of goods, which plaintiff had received from Pitray & Viel, by a power of attorney from one Cuvillier, and upon which plaintiff had paid the expenses, and was in the said power of attorney declared the purchaser. After the sale by plaintiff, to defendants, a writ of foreign attachment was issued against the said Cuvillier *ads.* Charles Jugnot. The account was afterwards attached in the hands of the defendants, and the money paid by them into Court, without notice to the plaintiff. *Held*, that the plaintiff was not estopped by the proceedings in attachment from recovering against the defendants the price of the box of goods; and their paying the money into Court did not discharge their liability.

There is nothing in the attachment Act which would require one to come into Court and litigate his rights in a suit to which he is not a party.

Before RICHARDSON, J., at Charleston, January Term, 1841.

Assumpsit on account for goods sold. The defendants had admitted the account, but said the debt had been attached in their hands, &c.

It appeared that the plaintiff's writ was filed 18th April, 1840. An

(*a*) 6 Rich. 124. *An.*

attachment had been filed 21st January, 1840, by *Jugnot* vs. *Cuvillier;* and the money was paid into Court, by order, &c, in May, without notice to the present plaintiff, and Jugnot received the money upon the usual terms. The return of the garnishees was received as competent, as a necessary part of the proceedings in the attachment, although objected to.

There was evidence adduced, which left it questionable whether the goods sold belonged to the plaintiff, Olin, or to Cuvillier, (see my notes.) But the case turns upon the charge to the jury.

I charged them, that the plaintiff was estopped, by the proceedings in the attachment; and the defendants discharged from the payment of the money, a second time. The jury found for the defendants, and the plaintiff appeals.

JUDGE'S NOTES OF EVIDENCE.

Macbeth—Defendants called and admitted they had purchased the goods, and were willing and ready to pay. *But the debt had been attached in their hands.*

Defence—Defendants have paid the money into Court. Attachment 21st January, 1840. Order in May, to pay into *Court, and the money was paid. This writ is of April 18th, 1840. Attachment in the name of *Jugnot* vs. *Cuvillier,* [*204 and defendants made garnishees. But no notice of the money being paid into Court, was given to plaintiff, and Jugnot has got the money, &c., to be repaid, if he should not recover against Cuvillier. The return of the garnishees, &c., filed 4th April, 1840. They are competent.

Roger—18th August, 1839, received the bill of lading, with orders to deliver to owners; the box was marked E. C. Olin called for the box, he said it was his; produced bill of sale, and power to receive the case. This was Cuvillier's power, &c., (see the power.) In January, 1840, Olin, plaintiff, had box, and paid for it. He paid expenses, duties, freight, &c., &c., and freed the case. 16th or 17th January, Jugnot called, and asked if he had such a case for Cuvillier. Witness told him what had been done. Witness told Jugnot it had been sold to Figeroux & Champy, by Olin. Witness advised Figeroux upon the attachment being issued; advised him to pay the money into Court.

Michel—Cuvillier borrowed money of plaintiff, Olin, and of witness too.

Cross-examined—Olin said he would not be covered by the case by $200. Cuvillier said he would send on goods to pay the debt, &c.

Court—Thinks plaintiff having notice of the attachment of Jugnot, cannot recover.

COPY OF RETURN.

CHARLES JUGNOT *vs.* EUGENE CUVILLIER.

State of South Carolina—Common Pleas—Attachment.

Personally appeared before me, Benj. Figeroux and O. Champy, who being duly sworn, deposed, that they have been served with a copy writ of attachment in the above case, and they make the following return, to wit: that they have a box of goods in their hands, for which they agreed to give the sum of $279. The goods were sold by Mr. Olin to them, and as they are in doubt to whom the money belongs, (as Mr. Olin informed Mr. O. Champy, that he intended to send some portion *of said money to Mr. Cuvillier,) they pray to be allowed to pay the money into Court, and to be discharged with their reasonable costs and [*205 charges. They further swear, that they know of no other property of the said Eugene Cuvillier.

B. FIGEROUX,
OSCAR CHAMPY.

Sworn to before me, this 28th March, 1840. } W. W. KUNHARDT, Q. U.

Endorsed, *Pringle*, for garnishee. Filed April 4th, 1840.

ORDER OF COURT, 8TH JANUARY, 1841

Jugnot vs. *Cuvillier.* Case of Attachment.—On motion, it is ordered, that the clerk do pay over the money to the plaintiff, paid him in this case, upon giving the security required by law.

J. S. R.

Recognizance in attachment—Without date as to either day, month or year—Charles Jugnot and W. W. Kunhardt, obligers to the State, in the sum of $592 40, (for the use of Eugene Cuvillier,) recited writ issued by Jugnot against Cuvillier, an absent debtor, and conditioned that Jugnot should prosecute his suit to judgment with effect, and should cause to be forthcoming and return to the absent debtor, the sum of $296 20 cents, in case the absent debtor should appear in Court, within a year and a day from the date of the bond, and discharge himself of the demand of the said Jugnot; and if the absent debtor should not appear as aforesaid, then that the said Jugnot should deliver into the hands of the clerk, all such overplus of moneys as shall be paid to him, after paying and satisfying thereout, such sums as should be awarded by the judgment of the Court, that the same might remain subject to the further order of the Court.

COPY OF RECEIPT TO CLERK.

Charles Jugnot vs. *Eugene Cuvillier*—In attachment—Figeroux & Champy, (garnishees.) Received of Charles C. Strohecker, Clerk of the Court of Common Pleas, $296 20, in full of moneys paid into Court by said Figeroux.

CHARLES JUGNOT.

Charleston.

*206] *COPY OF POWER OF ATTORNEY.

Know all men by these presents, that I, Eugene Cuvillier, late of Paris, France, and now residing in the city of New Haven, in the State of Connecticut, do hereby constitute and appoint Monsieur Auguste Olin, of Charleston, South Carolina, my true and lawful attorney, for me, and in my name, to receive from Pitray & Viel, of said Charleston, a certain box directed to me and marked "E. C.," and to give to the said Pitray & Viel, when said box shall have been received by my said attorney, a receipt, acquittance, and discharge therefor; which receipt, or discharge, when signed and delivered by said attorney, shall be a full discharge to (them) the said Pitray & Viel, of all claims which I may have upon (them,) on account of said box, and the contents thereof. And I do hereby declare, that my said attorney is the purchaser of the said box, and the contents thereof, and that he has full power and authority to apply the same, when received by him, to his own proper use and benefit. (And whereas, it is possible that the said box, and contents thereof, are directed to Madame Cuvillier, I hereby declare the said box, if so directed, is the box intended by this letter of attorney.) In testimony whereof, I have hereunto set my hand and seal, at said city of New Haven, this 3d day of January, A. D. 1840.

EUGENE CUVILLIER. [SEAL.]

Signed and sealed in presence of } WM. B. BRISTOL.

Duly authenticated, under hand and seal of Wm. B. Bristol, Notary Public, at New Haven, the day and year above mentioned.

(Translated.) Received the within mentioned box, Jan. 16, 1840.

(Signed) A. OLIN.

Charges paid us, by Mr. Olin, $56 37 cts.

THOS. J. ROGER & Co.,
Successors of PITRAY, VIEL & Co.

GROUNDS OF APPEAL.

1. That his Honor suffered the defendant to give in evidence certain proceedings in foreign attachment, to which the plaintiff in this action was no party.

*2. That his Honor allowed the defendant to give in evidence his own return, as garnishee, to the said writ of attachment, thereby making him a witness in his own case. [*207

3. That his Honor erred in charging the jury, that defendant's payment of money into Court, under order of the Court, as garnishee aforesaid, although after writ served on them by present plaintiff, and without notice to him of such payment, was sufficient to bar the plaintiff from a recovery.

4. That his Honor erred in charging the jury, that the plaintiff was not entitled to recover, although the defendant paid the money into Court, and suffered the attaching creditor to take it out of Court, without contest, (thus disabling plaintiff from ever getting it back,) after writ served on him by plaintiff, and without notice to plaintiff, and that too, when the same attorney represented both the attaching creditor and the garnishee.

5. That his Honor erred in charging the jury, that the plaintiff was barred by the defendant's payment of money into Court, when it is respectfully submitted, that the only question at issue was, whether the goods sold were the property of the plaintiff, or of the absent debtor; and his Honor should have charged the jury, and left them to decide accordingly.

6. That the verdict was palpably against law and evidence.

Yeadon, for the motion, contended that the attachment offered in evidence was not a bar to the plaintiff's recovery; and that the plaintiff had no right to make himself a party by force. Also, that the power of attorney was a bill of sale, and the attorney the purchaser.

Kunhardt, contra, cited 3 E. 367. Evidence under the plea of non-assumpsit.

Memminger, contra also. Was payment of money into Court, by a third person, a discharge? He also contended that there was collusion between plaintiff and the absent debtor. That this was a question for the jury, and they had decided. Olin, he contended further, had notice. Also, whoever has a claim against a thing attached, should come in and establish his claim. Cited 5 Johnson, 101; Sergt. 146; 1 Rice's Dig. *head, Attach. 80; 3 East. 367. The party has a remedy over against the party receiving it, 2 H. Black, 407; 1 *ib.* 665, settled the same principle; 2 Dal. 73; a party having account may come in and claim. He also contended that a garnishee was protected by the proceedings in attachment. [*208

Yeadon, in reply, said the rule laid down by the counsel only extended to the absent debtor, and cited 1 Bail. 193.

Curia, per EVANS, J. If Jugnot had attached a debt really due to Cuvillier, there would be no doubt that a payment of the money into Court, and the delivery of it to the plaintiff in attachment, would have discharged the defendant from the payment of it to Cuvillier. All the authorities agree in this, and this is the result of the case quoted in the argument. But the present is a very different question Here the plaintiff claims the debt as due to him, and from the evidence offered, it seems very clear the goods were purchased from him. Cuvillier seems to have been once the owner, but the evidence of sale to the plaintiff was pretty clearly established, unless there was some collusion between them to defraud the creditors of Cuvillier. If there was so, then that point should have been submitted to the jury. The case, as presented here is, whether the plaintiff, Olin, is estopped by the proceedings in the case in attachment of *Jugnot* vs. *Cuvillier*. I am of opinion he is not. There is nothing in the attachment Act which requires him to come and litigate his rights in a suit to which he is not a party. If Olin was a mere agent to sell the goods, and the debt due for them was Cuvillier's, then it might

have been attached in his hands, and if he had failed to assert his right, he would have been bound by the record. But in this case Jugnot did not make him a garnishee, and he had only verbal information that the money was attached. Under our practice he might, perhaps, have come in and had an issue to try the question, whether the money due for the goods was his, or the absent debtor's; but I do not know of any legal principle which makes it obligatory on him to do so. There is no such obligation imposed by the attachment Act. The defendants purchased the goods from the plaintiff. He sold the goods as his own, and nothing appears to the contrary, but that the debt was due to him. The defend-
*209] ants have voluntarily involved *themselves in the difficulty, by suggesting a doubt whether the money, or a part of it, might not belong to Cuvillier; for, independent of their return, as garnishee, there is not the slightest evidence to impugn the plaintiff's right to the money. Their course was a very plain one. They had no dealings with Cuvillier. All they had to do, was to return they had nothing belonging to him. But they chose to offer to pay the money into Court, and in consequence, the money was paid into Court, without the plaintiff's knowledge or consent, and Jugnot has received it as Cuvilier's money, on giving his bond to repay, if he should fail to prosecute his suit to judgment, or the absent debtor should, in a year and a day, discharge himself from the demand. By this course of proceeding, the plaintiff's right to recover his debt is not impaired. The proceedings in attachment do not estop him from demanding and receiving it, if the debt is *bona fide* his, and not the absent debtor's. The motion for a new trial is therefore granted.

GANTT, O'NEALL, EARLE, and BUTLER, JJ., concurred.

See 2 Sp. 116, 390. *An.*

GALLIOTT and LEFEVRE *ads.* PLANTERS' and MECHANICS' BANK.

One partner, after the dissolution of the copartnership, cannot bind the other, by signing the partnership name, without express authority; and notice through the public papers, to the plaintiffs, of such dissolution, is sufficient.
Each renewal of a note in bank is a new contract.

Before RICHARDSON, J., at Charleston, January Term, 1841.

This was an action of assumpsit, on a note drawn by Sebastian Aimar, dated 31st December, 1837, for three hundred and thirty-seven dollars, with the names of defendants endorsed. It was in evidence that a co-
*210] partnership had existed between the defendants, which was dissolved on the 14th November of the same year, before the *date of the note; and notice of the dissolution, through the public papers, reached the plaintiffs. The endorsement was not in the handwriting of either of the defendants, but was written by the wife of Lefevre, he himself being unable to write. There was no evidence of any express authority delegated to her to endorse for the firm, even while it was in existence. The witness on this point said he had seen her sign notes for the firm once or twice, and had mentioned it to Galliott. Mr. Morris, a clerk in the bank, stated that this note had been discounted in the bank, and pro-

tested regularly for non-payment. He believed the note to have been a renewal of another note of the same drawer, and endorsed by Galliott & Lefevre, as he found an entry of such a note on the books of the bank, kept by his predecessor in office. Sebastian Aimar had become insolvent between the date of the first note and the date of the one sued on, and he therefore presumed the bank had discounted this note on the faith of Galliott's solvency.

I left the facts to the jury, charging them, that unless Mrs. Lefevre had been authorized to endorse the present note, as well as those made during the partnership, the defendants were not bound by her endorsement.

The jury found for the plaintiff, and the defendants' counsel served me with the annexed notice of appeal.

GROUNDS OF APPEAL.

1. The plaintiffs were not entitled to recover, because the co-partnership was dissolved before the date of the note; Galliot never assented to, or authorized, the endorsement; and that plaintiffs had no notice of the dissolution.

2. The statements of Mr. Morris concerning a previous note were not evidence, because, even admitting that to be a fact, each renewal discharges the prior note. His evidence was not competent, because his knowledge on this subject was derived from memoranda kept by his predecessor, and not himself, and which memoranda were not produced in evidence.

3. The verdict was against justice, law, and evidence.

Cooper, for the motion, cited and relied upon 1 McCord, 388, as to the power of partners; 3 McCord, 526, was cited by him in order to show that every renewal of a note formed a *new contract, and that this note being a renewal of another, it might be considered as payment. He contended that the memoranda of the witness who testified was not competent evidence. [*211

Memminger, contra, contended that the wife of Lefevre had been allowed to write for them. Galliott had assented to it, and, therefore, he was bound by her act. This was a renewal. There were other counts in the declaration, and plaintiffs might recover on them.

Curia, per EARLE, J. The co-partnership of the defendants having been dissolved before the making of the note in question, and notice having reached the plaintiff, neither of them could bind the other by signing the partnership name, without express authority. It does not vary the case at all, that the note sued on was a renewal of one endorsed and discounted before the dissolution. It is well settled that each renewal is a new contract. If Lefevre himself could not bind Galliott, by signing the partnership name, it would be very strange if a third person, although the wife of one of them, could do it without authority from either. The revocation of all that she had previously done, was complete by the act of dissolution, and there is no proof of any given to her afterwards, either by Galliott or Lefevre. The plaintiff, therefore cannot recover on the note. It is equally clear that he cannot recover on the money counts. To say that a note discounted by the maker, is evidence of money lent to the endorser, is a novelty. Such a proposition is opposed to the common usage and general experience of men, and the defendants could only be charged upon clear and explicit proof, that in fact, the note was discounted for their benefit, and that they received the money. Motion granted.

The whole Court concurred.

See Post, 298; 6 Rich. 219; *Meggitt* vs. *Finney & Jones*, 4 Strob. 220. *An.*

*212] *THE ADMINISTRATORS OF WM. PATTON *vs.* JOHN MAGRATH.(*a*)

The admissions by the defendant, within two years from the commencement of the action, that the cotton of the plaintiff's intestate was shipped on board of his steamer, that it had been destroyed by fire, and that the controversy as to his legal liability was still pending, was held not to be a sufficient admission of his liability, on which the law would raise an implied promise.

The cause of action in this case accrued on the 3d December, 1832, and suit was brought by the plaintiff's intestate in May, 1833, and abated, before it was tried, by his death. In March, 1835, suit was renewed by the plaintiffs, and at February Term, 1839, of the Appeal Court, a nonsuit was ordered. In April following, this suit was commenced: *Held* that the statute of limitations was a bar to plaintiff's recovery. That this suit could not be connected with either of the former cases.

Before O'NEALL, J., at Charleston, May Term, 1840.

This was an action against the defendant, as a common carrier, for the value of fourteen bales of cotton, shipped on board the steamer Augusta, Captain Brooks, whereof the defendant was, at the time, owner. The cotton was shipped at Augusta, and destined for Charleston, but was burned on the 3rd of December, 1832, at Steele Creek, on the Savannah river, on board one of the lighters accompanying and in the employment of the steamer.

The bill of lading was dated 30th November, 1832. After some interval, the defendant was called on to pay for the cotton as a common carrier, and on his refusal, a suit was instituted at May Term, 1833. Before this suit was tried William Patton died, and administration was taken out on his estate by the plaintiffs. On the 7th March, 1835, plaintiffs' attorney was directed to renew the action, and on the 18th March, 1835, the defendant accepted service, and an appearance was entered by his attorneys, at the request of the plaintiffs' attorney. The writ was served on Captain Brooks, (who was joined in the same action with the defendant.) On the 22nd January, 1836, the case was ordered for judgment against Captain Brooks, by default. The defendant, Magrath, pleaded the general issue. On the 15th of January, 1838, a verdict was rendered for the defendant, which was, at February Term of the Court of Appeals, set aside and a new trial ordered. On the 18th January, 1839, the case was again tried, and a verdict of seven hundred and thirty-four dollars and fourteen cents, found for the plaintiffs. On
*213] the appeal, the Court of Appeals, at February Term, 1839, (Rice's Rep. 162,) ordered a non-suit, on the ground that the defendant, as owner, and Captain Brooks, as master, were improperly joined in the same action. On the 20th of April, 1839, an action was commenced against the defendant, and he accepted service, or by his attorney entered an appearence at the request of the plaintiffs' attorney. To this action he pleaded the general issue, and the statute of limitations.

Mr. William Patton, a witness for the plaintiffs, proved, that within the last two years, or about two years ago, he heard the defendant speak of this claim, as an unadjusted one. He admitted that the cotton was shipped on board his steamer, and was burned on board the lighter.

(*a*) S. C. before; Rice, 162; Dud. 159.

He said the defendant and other steamboat owners applied to the Legislature to exempt them from liability for loss arising from fire.

After the plaintiffs had stated they had no further proof to offer, I said to the plaintiffs' attorney, Colonel Hunt, that in my judgment, the statute of limitations was an insuperable bar to his recovery, and advised him to submit to a nonsuit, with leave to move the Court of Appeals to set it aside. This was accordingly done.

GROUNDS OF APPEAL.

1. Because, it is respectfully submitted, the Court ought to have instructed the jury, that the admission by the defendant, within two years from the commencement of the action, that the cotton of the plaintiff's intestate was shipped on board of his steamer, and had been destroyed by fire, and that the controversy as to his legal liability was still pending, was a sufficient admission of the state of facts on which the law will raise a promise.

2. Because the defendant, having been sued by the deceased, in his lifetime, and by his administrators since his death, and having been heard in his defence, he has always been aware of the existence of the demand, and does not bring himself within the morality or equity of the statute, and the mere informality in the suit ought not to screen him from a legal liability.

3. Because the acknowledgment was made before the statuary bar was complete, about two years before the trial, and this was sufficient to take the case out of the statute.

**Curia, per* O'NEALL, J. The cause of action in this case accrued on the 3rd December, 1832, when the cotton was burned. [*214 The suit which was instituted in William Patton's life time, abated by his death. That case might have been connected with the first suit brought by the administrators, so as to have prevented the bar of the statute against it. But this last case was nonsuited, and the present case can be connected with neither. The plaintiffs are therefore barred, unless William Patton's testimony could save them. It cannot have that effect, for two reasons, 1st. If it is any sort of admission of the plaintiffs' claim, it is the slightest conceivable one. At the time it was made, two years ago, (1838,) the statute had run out, and such an admission would not be evidence to prevent the bar of the statute from precluding the recovery of a debt. 2nd. This case is an action *ex contractu*, for the recovery of damages, where the defendant always resisted his liability to pay them. It is therefore idle to suppose that his words to Mr. Patton admitted the legal liability from which a promise would be implied. They meant that the litigation between him and these plaintiffs was undecided. There is nothing in this to remove the bar of the statute.

The motion is dismissed.

The whole court concurred.

Hunt, for the motion. *Magrath*, contra.

See 2 Sp. 485; 3 Hill, 214; 1 Bail. 542. *An.*

*215] *THE STATE, EX RELATIONE W. C. OAKLEY ET AL. *vs.* BRIGADIER-GENERAL EDWARDS ET AL.

Where a detachment of the Militia of the fourth Brigade, South Carolina Militia, had been detailed, (by the Brig.-Gen. of the Brigade,) as a fire-guard, in the City of Charleston, under the Act of 1829, and before their term of service as such guard had expired, the officers and sergeants belonging to this detachment, together with all the officers, &c., composing the said Brigade, had been ordered by the Brigadier, under orders from the Governor of the State, to encamp and perform encampment duty—It was held that the fire-guard and encampment duties did not conflict; and a prohibition to restrain the collection of fines imposed by the court martial *against the relators*, for a neglect of the latter duty, was refused.

Before EARLE, J., at Charleston, May Term, 1841.

This was a suggestion for a prohibition to restrain the collection of certain fines imposed on the relators by a court martial. By an Act of 1829,(*a*) the Brigadier-General or other officer commanding the fourth brigade, in order to prevent the confusion which may arise from too many men being under arms when fire shall break out in the city of Charleston, is authorized to fix the number of men necessary to be under arms in such cases, and to make regulations by which a certain portion only of the militia of Charleston shall be required, for the period of three months, to hold themselves in readiness to parade in case of alarm from fire; and the said portion of militia shall be commanded by a field officer, detailed according to the order of officers, &c. And the Act proceeds to impose upon defaulters, in case of alarm, the same fines that are imposed on persons making default at regimental musters. General Edwards being in command of the fourth brigade, in January, 1839, according to the provisions of the Act, by general orders, detailed four companies from the 16th and 17th regiments, under the command of Major Oakley, and the other relators, to compose the fire-guard for three months from and after the first day of February, 1839, and they were accordingly organized and paraded as such. On the 6th of March, General Edwards, in obedience to the general orders of the Commander-in-Chief, directed
*216] an encampment of the officers and sergeants of the *fourth brigade to be held at Morrison's farm, seven miles from the city, on the 8th of April, for five days. On the 27th of March, the Commander-in-Chief, by general order, excused the officers and sergeants of the Charleston light dragoons, from attending the encampment at Accabee, and directed that the said corps of light dragoons should be officially detailed by the Brigadier-General, to serve as a fire-guard *ad interim;* and the Brigadier-General, on the 1st of April, issued his order to that effect, and thereby also dissolved the fire-guard under the command of Major Oakley, and ordered the officers and sergeants composing the same to attend the encampment at Accabee. This order Major Oakley and the other relators, officers in command of the fire-guard, did not obey, conceiving themselves already detailed upon a special duty under a law of the State, which exempts them for the time from the performance of the duty required of them. They did not attend the encampment, and were

(*a*) 6 Stat. 395. *An.*

afterward fined by a court martial for their default. They then filed this suggestion for a prohibition to restrain the collection of the fine.

The cause was heard upon the suggestion and answer, before Mr Justice Earle, at the May Term, 1839, who pronounced the following judgment, refusing the writ of prohibition prayed for:

This application is made on the ground that the fire-guard for the city of Charleston, having been detailed in January, 1739, for three months from the 1st of February, neither the Brigadier-General nor the Governor had, for that time, any further command or control over them; but that they were entirely withdrawn and set apart from the general body of the militia, and from the jurisdiction of the military courts. The last Act of 1829, on the subject of the fire-guard, enacts that "the Brigadier-General be, and he is hereby authorized to fix the number of men necessary to be under arms, in such cases, and to make regulations by which a certain portion only of the militia shall be required, for the period of three months, to hold themselves in readiness," &c. And provides for fines, courts martial, reporting defaulters, and ordinary parades; and the 8th section is in these words: "Nothing herein contained shall be construed so as to exempt that portion of the militia *of Charleston, [*217
which shall compose the fire-guard, from the performance of ordinary militia duty." This is enough to show that it was never intended to exempt the fire-guard from the operation of the militia laws. In pursuance of the Act, the Brigadier-General designates certain corps to perform a particular duty, in an emergency, which may happen; but which is not certain to happen during the whole term for which they are thus set apart. This affords no reason why they should not perform the other ordinary duties of the militia, or that they should be released from the obligations to obey the lawful commands of their superior officers. Independently of the subsequent Act, appointing encampments, I should consider the fire-guard, thus detailed, as being a detachment for a particular service, under orders; that the same commanding officer, who sent them on detachment, may at any time, by a subsequent order, recall them, and send other troops in their stead; and that the Commander-in-Chief, of necessity, from the very nature of his position, has the same authority. The Act of 1829 confers no new power on the Brigadier-General. In cases of alarm from fire, or other great unexpected danger, I apprehend, he would have had authority to call out the militia, or any part of it, to preserve the public tranquillity and safety. It authorizes him to make regulations for detaching a certain portion only, (leaving the number and description to him,) for an extended time; he may, in his discretion, detach and recall, as the public interest may require. But the Act of 1833 makes it the duty of the Brigadier-General, under the direction of the Commander-in-Chief, once in two years, to assemble the commissioned officers of his brigade, at some convenient place within the brigade, to be encamped for five days, for instruction and exercise. Here is no exception in favor of the fire-guard; nothing which exempts the commissioned officers composing it from being summoned to attend the encampment; especially if the order by which the guard was organized, be expressly rescinded, and the guard dissolved. Nor is there any thing in the nature of their office and duty which makes such a proceeding at

all inconvenient to them, or incompatible with the public interest. It would, of course, be the duty of the Brigadier-General, when dissolving one guard, to enable it to attend the encampment, to organize another to attend in its stead; a duty *which he would be highly culpable *218] if he omitted to perform. The fire-guard is expressly declared not to be exempt from ordinary militia duty. I understand, by ordinary duty, any parade or muster for review, inspection, exercise or instruction, prescribed by law, and recurring periodically. I consider an encampment an ordinary militia duty. Extraordinary duty, is such as arises on occasion of sudden emergency or alarm; as invasion, insurrection and the like, when recourse is had to the extraordinary powers vested in commanding officers. Very many persons, and some classes of persons, are liable to serve on these last occasions of extraordinary duty, who are exempt from ordinary duty. If to attend an encampment be an ordinary duty, then, by law, the fire-guard is not exempt. If it be an extraordinary duty, then the special commands of the executive were of such authority as to require their obedience.

If the officers had attended the encampment, and had been brought to a court-martial, for not attending a parade of the fire-guard, in their absence, can it be doubted that their excuse would have been sufficient? And here, I may ask why they did not attend before the court martial, and render their excuse for not attending the encampment. After refusing to obey the orders of the Commander-in-Chief, and of the Brigadier-General, and evincing such confidence in their own judgment as to refuse also to appear before the court martial, to justify themselves, they come with an ill-grace before the court to ask its interposition. I cannot but allude here, in terms of strong reprehension, to the frequency with which this course is adopted, in regard to all inferior tribunals having limited judicial powers. A man omits to perform some public duty required of him, as to work on the roads, or attend a muster, on some legal grounds affording a pretext; when summoned to answer for it, before the proper authority, he refuses to attend, and when fined, as he ought to be, he straightway goes to a lawyer, and brings his complaint before the Court. I confess I have no sympathy for those who neither perform their duty nor have the courtesy to excuse themselves for the omission; nor will I convert the power of this Court, to grant writs of prohibition, into a general dispensing power in favor of the negligent and the wilful. It is very clear to my mind, that the relators were subject to the jurisdiction of *219] the court martial, as *was also the cause of the complaint against them. That is enough to induce me to refuse their motion. I have, however, as little doubt that they were liable to perform the duty required of them; that the orders of the Major-General and the Commander-in Chief were no violation of the law, and were strictly conformable to military usage; and that it was the duty of the relators to obey.

The motion for a new writ of prohibition is refused.

This judgment the relators now move the Court of Appeals to reverse.

GROUNDS OF APPEAL.

1. That fire-guard and encampment duties are conflicting duties, and the persons liable to do both at the same time, have the right of election which to perform.

2. That the organization of the fire-guard is a privilege of the city of Charleston, to secure her against internal commotions in cases of fire, guarantied to her by Act of the Legislature, and neither the Brigadier-General nor the Governor has the right to deprive her of it.

Yeadon, for the motion, contended that the fire-guard belongs to the city of Charleston, and that the interests of the city are involved, and that no power but the Legislature could deprive her of her privilege. He cited Acts of A., 1829, (Mill. Laws, 122, 2d and 3d sec.) The Legislature recognized the necessity of having this guard. He said the city was liable to incendiarism and an influx of strangers, without this guard; and argued further that this fire-guard was completely detached from the militia of the State, during the three months service required by the Act. Cited in the course of argument, Condy's Dig., 146.

Northrop, contra, cited Act, 1833—army regulations. He contended that the jurisdiction of a military court was exclusive. The militia are under the command of the Governor. He has the right to demand their duty as he pleases, unless he is restrained by law or there is some exception. The Brigadier is made the officer commanding Charleston, so far as a fire-guard is concerned, and he had the right of regulating the detail.

**Curia, per* EARLE, J. The earnestness with which the motion has been urged upon this Court, has induced me to reconsider the grounds taken in argument, both here and in the Court below. [*220 And I confess myself still unsatisfied with the reasoning by which it is attempted to establish the claim of the relators, to be exempt from the operation of a law for the discipline of the militia, which makes no exception in their favor; and to be released from the obligation of obedience to the orders of their superior officers, and of the Commander-in-Chief. Obedience is the first duty of a soldier; without it, that subordination which is essential to the effective operations of an armed force, cannot be obtained or preserved. It would be very injurious to the organization and discipline of the militia, if the civil courts were habitually to interfere with the jurisdiction of and decisions of courts martial, in cases where they may lawfully take cognizance of the persons and subject matter. Such, in the opinion of the majority of the Court, was the case of the relators, and we have striven, in vain, to perceive the force of their claim to an absolute exemption. In the view which the Court has taken of the subject, it was not a case of conflicting duties. It was the duty of the relators to obey the last orders of their superiors in command, by whose order they had, in the first instance, been detailed for a particular service. They were expressly recalled from that service, and another corps detailed in their stead. These orders were surely within the competent authority of the Brigadier-General and Commander-in-Chief. There was then no conflicting duty. If it had been a case of that kind, it would have furnished no ground for prohibition, as a case of exemption from the jurisdiction of a court martial. Both the supposed duties were under the orders of the same superior officer, and a default in the performance of either would have brought the relators before the same tribunal. What they claim as an exemption was merely matter of excuse, to be considered by the court martial. Can it be supposed that after the order dissolving the fire-guard, and requiring them to attend the encampment, they could have been brought to trial for omitting to attend a parade as a fire-guard, or that the last order would not have been a valid excuse?

To dispose of the whole question, it is only necessary to inquire, had

*221] the court martial jurisdiction of the persons and *the subject matter? and it is obvious that it had. The relators are militia officers of the fourth brigade, liable to be tried for any default of militia duty within it, and the charge was a failure to attend an encampment of the officers of that brigade, in obedience to the orders of the Commander-in-Chief. The persons and the subject matter were therefore properly and exclusively within the cognizance of the court martial. Not only does the Act of 1829, which requires the guard to be detailed, expressly declare that they shall not be exempt from the performance of ordinary militia duty, but the Act of 1833,(a) providing for brigade encampments, makes no exception in their favor, and from the generality of its terms necessarily includes them. This Court, therefore, will not undertake to review the decision of a competent tribunal on a subject within its peculiar jurisdiction; and there is no ground to interfere by prohibition. A majority of the Court concur in the reasoning and conclusions of the Circuit Court, and the motion to reverse its judgment is refused.

RICHARDSON, O'NEALL, EVANS, and BUTLER, JJ., concurred. GANTT, J., dissented.

NOTE.—As the judgment of the Circuit seems to impute blame to the relators for not attending personally before the court martial to plead their exemption, or render it as an excuse, it is proper to add that, for this omission, they had the sanction of the late Mr. Justice Bay, who had, on a former occasion, held the guard legally exempt from such duty, and had granted a prohibition. That was the reason for their not attending the court martial.

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*222] EDWARD MCKENZIE *vs.* CHARLES E. CHOVIN.

The Boards of Commissioners of Roads represent the people of the district or parish for which they are appointed, and are clothed by law with a certain authority to act for the public. They are not, however, *a corporation*, and have no corporate funds; consequently they are exempt from private actions for neglect of duty.

A single Commissioner is not liable for damages, in a private action, for an injury which may have been the result of want of repairs in the roads, &c., in his particular section.

Before GANTT, J., at Coosawhatchie, Spring Term, 1840.

This was an action on the case, brought by the plaintiff for damage sustained through injuries done to his horse on the public road, of which the defendant was commissioner, through the alleged neglect of the defendant to keep the road in repair.

The defendant demurred generally; and on argument, I sustained the demurrer, on the ground that the case of *Young* vs. *The Commissioners of the Roads*, reported in 2d N. & McCord, settles the law of the land as to the liability of commissioners in private actions. The plaintiff thereupon served me with a notice of a motion to set aside the judgment on demurrer, upon the annexed grounds.

(a) 8 Stat., 572, § 26. *An.*

GROUNDS OF APPEAL.

1. Because, under the pleadings, the judgment should have been for the plaintiff.

2. Because the decision was contrary to law.

Hutson, for the motion, cited 2 N. & McC., 537, *Young* vs. *The Commissioners of the Roads*, and said that that case was decided on the authority of *Russell* vs. *The Men of Dover*, 2 T. R., 667, but contended that the Court, in the decision of the case of *Young* vs. *The Commissioners*, had misstated the point decided in the case of *Russell* vs. *The Men of Dover*. He argued that from the authority of the English cases, this action might be sustained, and the defendant be compelled to pay for the injury which the plaintiff had sustained, the result of his negligence. He cited further, 2 Brev. Rep., 293; Acts of Assembly, 1828, p. 32. Under this authority, a single commissioner* of roads is liable for damage sustained on his section. Common justice sustained the position that a single commissioner was liable in this form of action. The penalty of fifty dollars would not reimburse an individual for his loss. This was a penalty, of which he could receive nothing. Sending the loser of property to the indictment was a denial of justice. A planter of wealth who is commissioner of roads, and perhaps whose hands alone keep the road in repair, would prefer to pay the penalty to lose the work of his hands for the time he would be engaged in repairing the road. [*223

Allston, contra.

Curia, per EARLE, J. The Act of 1825,(*a*) which requires a division of the roads among the commissioners, makes each of them responsible for those within the division assigned to him, and subjects him to the same penalties that the entire board was subject to before, and renders him liable to be proceeded against in the same manner. The question made here, formerly arose in *Young* vs. *The Commissioners*, (2 N. & McC. 537,) which was an action on the case, for an injury done to the plaintiff's wagon and horses, sustained by the breaking of an insufficient bridge; and it was held that the action could not be maintained. The grounds upon which the decision is put in that case, are unsatisfactory and very briefly considered, and the case of *Russell* vs. *The Men of Devon*, (2 T. R., 667,) mainly relied on, does not seem to have been very accurately examined. That such a precedent, if allowed, would lead to an infinity of actions, was assigned by Lord Kenyon, as a reason of some weight for not incorporating into the law what was regarded as a new principle. But it was held that such an action would not lie against the county, as it was not a corporation, and had no corporate funds, out of which satisfaction could be made. If damages were recovered, they must be levied on one or two individuals, who would have no means of reimbursing themselves, except by bringing separate actions against each individual of the county, for his proportion, which would be intolerable; and a case is cited from Bro. Abr. as authority for the position that, in such case, an action will not lie for an individual.

*Here, as in England, the public roads and bridges are required to be kept in repair by the labor and at the expense of the people of each district or parish, as the case may be; and in the absence of a board of commissioners, there would be the same reason for holding the people of each district or parish liable to be sued, that was urged in *Russell* vs. *The Men of Devon*, and there would be the same conclusive argument against their liability. The board of commissioners represent [*224

(*a*) 9 Stat. 558. *An.*

the people of the district or parish for which they are appointed, and are clothed by law with a certain authority to act for the public. They are not a corporation, and have no corporate funds; nor, since the Act of 1825, has the individual commissioner charged with the superintendence of a particular road division. The duty of keeping the roads and bridges in repair is prescribed and regulated by the statute, a duty imposed on the commissioners, under a penalty for refusing to serve, as well as for not repairing, recoverable by indictment; and it would be against every principle of justice and right, to hold them responsible, out of their private estates, for every injury that an individual may sustain, as well as liable to be indicted for every neglect of duty; to compel them to serve, and then subject them to a liability, from which their constituents and employers are exempt. We cannot suppose that such was the intention of the Legislature. There are cases in which an individual or corporation may be bound to repair a bridge or road, by reason of the grant of a toll. The obligation to repair, with ordinary diligence, is a condition of the grant, and as a compensation is received in every instance, for the use, whosoever sustains an injury from the want of repair, may maintain an action. But it is otherwise with the commissioners of roads, and on principle, as well as authority, we conceive that this action will not lie.

The motion to reverse the judgment of the Circuit Court is refused.

The whole Court concurred.

See 1 Rich. 345; 1 Sp. 219; 2 Sp. 553. *An.*

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*225] *T. GAILLARD *vs.* V. LE SEIGNEUR.
THE SAME *vs.* E. LE ROY and N. LE ROY.

A note given for usurious interest, by the Acts of 1777 and 1831 is void, as well in the hands of an innocent holder, as between the original parties to it; and usury may be given in evidence under the *plea of the general issue*, in assumpsit, (*a*) where the whole note is given for usury.

The husband of a "*feme sole trader*" is a competent witness to prove usury under the Act of 1777. (*b*)

Before O'NEALL, J., at Charleston, May Term, 1840.

These were actions of assumpsit against V. Le Seigneur, as the endorser, and E. Le Roy, (a feme sole trader,) the maker of a promissory note, and her husband, N. Le Roy.

The defendants pleaded the general issue, and under it proposed to give in evidence, that the consideration of the note was usurious. Mr. Simons, the plaintiff's attorney, objected, that since the Act of 1831, (Acts of 1831, p. 48,)(*c*) which repealed so much of the Act of 1777 as made a contract founded on an usurious contract void, usury could not be given in evidence under the general issue, but must be specially pleaded. There is, I think, much force in this objection, where the

(*a*) See 5 Rich. 54.
(*b*) See *Philips* vs. *Calwell et al.*, 2 Rich. 2. *An.*
(*c*) 6 Stat. 409; 4 Stat. 364. *An.*

defence only goes to show that a part of the contract cannot, under the Act of 1831, be enforced; but where, as in this case, the defence is, that the whole sum secured to be paid by the note is for usurious interest, then the objection cannot apply. For, in such case, the note is without legal consideration, and in law there is no assumpsit on the part of the defendants to pay it. (1 C. P. 470, 471.) Any defence which shows that at the commencement of the action the plaintiff had no cause of action, may, in general, be given in evidence under the general issue of non assumpsit, in the action of assumpsit.

The defence was, therefore, permitted to be gone into. The husband, N. Le Roy, was offered as a witness, under the usury act of 1777, to prove that the note was usurious. He was the person who, as the attorney of his wife, made the note, and who negotiated the loan, and borrowed the money. He was objected to by the plaintiff. I thought, under the words of the act, "*the borrower* or party to such usurious bond," &c., he was a competent witness. He was accordingly sworn, and proved that this note, of which the following *is a copy:— [*226
"Charleston, September 30th, 1839. $600. Sixty days after date, I promise to pay to the order of V. Le Seigneur, six hundred dollars, value received. (Signed) E. Le Roy, by her attorney, N. Le Roy. (Endorsed) V. Le Seigneure,"—was given, with another of the same amount and same parties, to Mr. Willis, *the money broker of Charleston*, for the loan of $2800 for sixty days. Other notes were given for the money borrowed. For the plaintiff, Mr. Willis was sworn, and denied this statement. He said that $540 was paid by the plaintiff to him for the note, and he handed it to Mr. Le Roy.

The cases went to the jury, and they were told if they believed Willis, they ought to find for the plaintiff $540, without interest and costs; but if they believed Mr. Le Roy, the whole note was usurious, and they ought to find for the defendants.

They found a verdict in each case for defendants.

The plaintiff appeals, on the annexed grounds.

GROUNDS OF APPEAL.

1. Because usury cannot be given in evidence under the plea of the general issue.

2. Because, in the latter case, N. Le Roy, the husband of the sole trader, was permitted to testify under Act of Assembly 1777.

Simons, for the motion, cited 5 Dane's Abr. 332; P. L. 286; Acts, 1830, p. 27; 1 Tread. 144; 1 Selwyn N. P. 53. He contended that usury could not be given in evidence, under the general issue, but that it must be specially pleaded. This case was an exception to the rule laid down in Chitty, that any evidence which goes to show there is no contract, is admissible. Cited Harp. 201; Rice Rep. 310; Chev. 177; 1 Chitty, p. 474.

Second ground—That N. Le Roy, the husband, not being the borrower, but the mere agent, was incompetent to give evidence of usury, under the Act, and at common law was excluded, because a party to the record. He is not the party or borrower contemplated by the Act of 1777. Cited 1 Bail. 479.

Magrath, contra, said: A new trial is required for two reasons—first, the alleged incompetency of N. Le Roy, the husband;* second, the inadmissibility of [*227
the defence of usury, under the plea of *non assumpsit*. It is said N. Leroy is incompetent, first, because he is the husband; second, because he is a party to

(*a*) See 3 Bur. 54. *An.*

the record; third, because he is not the "party or borrower," contemplated by the Act of 1777.

Even if he is the husband, he is competent on this issue. It is admitted that according to common law, the husband is not a competent witness for the wife. But is it not as much against common law that a wife, during the life of the husband, can be sued on a contract? The right here to sue is an exception to the common law principle. It is given by statute, A. A. 1744, sec. 10; see Cooper's Statutes, 3d vol. p. 620. This, then, is an exception. And they ought not to complain of what is deemed an exception to the common law of evidence, when the plaintiff is only in Court by an exception to the common law of pleading. But the very exception provides for the case. In the section wherein power is given to sue a feme covert as a sole trader, it is declared that "all proceedings to judgment and execution, by or against such feme covert, being a sole trader, shall be as if such woman was sole and not under coverture." All proceedings, of course, must mean to include as well such as are in issue by way of evidence, as those in issue by way of pleading. If this is not so, then the provision requiring the husband to be joined "for conformity," would, *pro tanto*, repeal the section itself. The institution of that thing called a sole trader is an anomaly, and of course it cannot be expected that any of the rules, either of pleading or evidence, can apply so well as where there is nothing in principle opposed to the well established liabilities and exemptions of the common law.

But it is said the husband is a party to the record, and therefore incompetent. It is admitted that the general rule is clear that a party to a suit cannot be a witness. But why? Not because he is a party, but because, being a party, his interest may be more or less, but certain, nevertheless; and this of course disqualifies. But it is the interest which makes him incompetent, and, therefore, if this is removed, the rule should cease. This is the established principle, as in 1 Phillips on Ev. 70, where it is laid down that the mere fact of being a party to the record will not disqualify, if there is no interest or liability. So in the Courts of
228] this State, the principle has been affirmed, *State* vs. *Anthony*, (1 McCord, 285,) *Vinyard, Executor*, vs. *Brown*, (4 McCord, 24,) and fully sustained in *Lenox* vs. *De Haas*, (2 Yeates, 37.) Now, here, the witness, it is conceded, is free from all bias which may result from his being a party to the record, because he has no interest. And here it may be observed, that the exclusion is asked for in a case where the Legislature has deemed it proper to shield the defendant; to say not only that the obligation to pay usury is avoided, but also that if even a party to the record and directly interested, he still may testify. Where, then, such a defence is brought to the view of the Court, it is not proper that such construction should be given as, by excluding evidence, to sustain the evil which the Legislature seemed disposed to prevent. Again, it is said he is not "the party or borrower." Who is, if the witness is not? He did the business—effected the loan. Madame Le Roy was away. Who could prove the transaction, if it was not the witness? It is wasting words to argue in the affirmative, that he is "the borrower."

The second ground is, as to the pleading. The Act of 1831, p. 49, is an amendment of the Act of 1830, p. 29. The first section provides that the bond, contract, &c., shall not be utterly void, as declared in the Act of 1777. The second section provides that the plaintiff shall recover the money actually advanced. The money as money. His cause of action is not the bond or note, but the money paid, and it may be a question whether he can declare, except for money paid. The original contract is not at all revived, but a new assumpsit by law is created. This being the case, *non assumpsit* is of course the proper plea. Now, in this case, money was paid; therefore, here, non assumpsit was certainly proper. Chitty, 470. But suppose the contract to be revived for so much, still non assumpsit is the proper plea. If the note is valid by A. A. 1831, then the defendant can inquire into the consideration under non assumpsit. Here the consideration was the money; evidence of the amount, therefore, is evidence of consideration, and unquestionably proper. Whether, therefore, the old contract is revived, or a new assumpsit raised by the statute, still the evidence is admissible. 1 Tidd. Pr. 591.

It can be scarcely said that there is any thing like special pleading in assumpsit.
*229] The *gist* of the action is fraud, and this, therefore, covers every thing by way of defence which rebuts the fraud.

Now, in the evidence of usury, the reply is given to the fraud. It is disproved by showing the amount really received. Usury, therefore, is admissible under non assumpsit; and if it is necessary to make out this position, still more clearly, it may be shown that usury, under our law, cannot be pleaded specially. With us, usury is not an answer to the action, it only answers part of the action. Now, it is one of the first principles in pleading, that the plea must be an answer to the whole cause of action; no such thing as pleading to a part of a cause of action; 5 Bac. Abr. 449; K. 3, Tit. Pleading; *Shaw* vs. *Everett*, 1 B. & P. 222; 1 Sellon's Practice, 298.

Curia, per BUTLER, J. The note upon which this action was brought, was given entirely for usurious interest, and both by the Act of 1777 and 1831,(*a*) was absolutely void, as well in the hands of an innocent holder, as between the original parties to it. Like every other naked contract without consideration, it created no legal obligation. In this point of view, the defence of usury was properly allowed to be given in evidence, under the general issue. But it is contended that the principal witness to prove the usury, was not competent, as he was the husband of the party intended to be bound by the contract. It is true, that at common law, the wife and husband cannot be allowed to testify for each other, on an issue in which they are directly interested. Neither can a party be a witness in his own cause. By the terms of the statute of 1777, the common law is so far altered as to permit a party to a usurious contract to be a witness for himself. The great object of the statute was to reach the usury, by getting rid of all common law disabilities of the witness to the contract. It was said, however, that by the terms of the statute, this privilege must be limited to the party really in interest, and for whose benefit the money was borrowed, and that as the money was borrowed upon the note of E. Le Roy, the wife, and for her use, she alone could be the witness. This is a technical exception, and if allowed to prevail, would go far to defeat the object of the statute. This might be obviated by the law which requires the husband to be joined for conformity sake, in all actions brought on the contracts of a feme sole *trader. Their identity by a fiction is presupposed; and the fictions of law may sometimes be resorted to, to preserve its symmetry and justice. Why, then in mere legal contemplation, should the husband not be regarded as a party to this contract? He is a party to the record, for conformity, and let the same fictitious conformity extend to the contract, and all objections would be removed. But I do not wish to rest the judgment of the Court on such a ground. The provisions of the statute must not be evaded by a technical construction of it, inconsistent with the clearly expressed purpose and obvious meaning of the Legislature. [*230

The plenitude of the remedy ought not to be impaired, but maintained, by the Courts. The usurer is entitled to no sympathy or protection, in his efforts to gratify his own cupidity, by making victims of the weak and necessitous. E. Le Roy was not present when her husband, under a power which he may have abused, gave this note, and if the right to testify was restricted to her alone, this would be the result, that the party who may have been ignorant of the contract, in its inception, would be the witness contemplated by the statute, whilst the party who really

(*a*) 4 Stat. 364; 6 Stat. 409. *An.*

made it, and was cognizant of all the facts, would be excluded. Such cannot be the operation of a statute which it has been said could not be evaded by the wit of man. Crafty contrivance is less to be tolerated than an open attempt to violate law. The second section of the Act of 1777, (4 Stat. at Large, 364,) recites, by way of preamble, that as transactions against the Act "will be generally carried on only when the borrower and lender are present together," be it enacted, &c., "that the borrower or party to such usurious bond, specialty, contract or promise, &c., shall be, and is hereby declared to be, good and sufficient witness in law, to give evidence of such offence against the Act, &c." Now, what party was here meant, but the party that was present, as stated in the recital? The party that, in fact, borrowed the money and made the contract. The object of the Act was to make a witness of the person that was engaged in, and consequently acquainted with, the transaction. Although E. Le Roy was a party to the note, N. Le Roy was the actual borrower, and present when the contract was made. Had he been an indifferent agent, he would have been a good witness, without the statute, for he would not have been interested. The aim
*231] *of the statute was to make witnesses of all the parties interested in the case, who could give such information as would expose and detect the usury. We think the evidence of N. Le Roy was properly received on the trial below. Motion refused.

GANTT, O'NEALL, EVANS and EARLE, JJ., concurred.

RICHARDSON, J., dissented, and delivered the following opinion:

The terms of the Act are "that in all cases," &c., "where any suit or action shall be brought," &c., "touching any usurious bond, specialty, contract, promise or agreement, or taking of usury," &c., &c., "the borrower or party to such usurious bond," &c., "shall be, and is hereby declared to be a good and sufficient witness in law, to give evidence," &c., P. L. 284. The terms borrower and party to such bond, &c., are synonymous. We usually say party to a bond—borrower by parol. Both terms signify the person that received the money on his own credit and responsibility, and has been sued for it. No other person can be the borrower or party sued for the money lent. The proposition of the Act is then plainly this: Whoever is sued at law for money borrowed on usury, is made a competent witness. Now, is N. Le Roy such a person. Is he sued at law touching any usurious bond, &c., or promise? Is he borrower or party to any such? Is he in any way liable for the money he obtained as agent of Emma Le Roy, and for which he gave her own note—not his? It ought to be enough to answer that N Le Roy has been sued with his wife, the sole trader, merely for conformity; that it is not pretended he is liable for the money. But I admit that the case is to be decided as if his name did not appear on the record; although the Act does clearly contemplate the party or borrower as sued at law before he can be a competent witness. These three propositions are, I presume, granted. If not, they are all proved by the fact that N. Le Roy was the mere agent of the responsible party and borrower. Emma Le Roy, and is sued with her for legal conformity only. If N. Le Roy were not the husband of Emma Le Roy, both now, and at the

time of borrowing the money, the error of calling him the borrower *or party, would strike us at a glance. If he had been only the [*232
clerk of Emma Le Roy, and had negotiated the usurious loan for her, none would call him the party or borrower of the money, and he would not have been sued. Now, then, follow out that supposition. As such a clerk to Mrs. Le Roy, he would not have been sued, and would be a good witness at common law; but is not made so by the Act of 1777.

Go a step further, and suppose the clerk, N. Le Roy, had afterwards married his principal, Emma Le Roy. It would then follow that he could no longer be a witness for or against her, at common law, and the only remaining question would be, can he then, by virtue of the Act, be made the borrower or party to the original loan, on usury, so as to be made a witness under the Act? The answer would be this: the true character and parties to the transaction, cannot be changed by the act of Mrs. Le Roy and her clerk. "*Quod ab initio non valet, tractu temporis non convalescere potest.*" She cannot make him the borrower. And if Mrs. Le Roy, the party and borrower, has thus chosen to render her clerk an incompetent witness, it is no more than law to allow her free agency. She took him for better for worse, which includes the legal consequence, that her former clerk can be no longer a witness for or against her, as he might before the marriage have been at common law; and there is no alchemy in the Act to transmute the character and position he held at the time the money was borrowed. He is still no borrower or party to the loan, and always will be none. But have we not described the precise situation of Mr. LeRoy himself? He was the clerk or other agent of Mrs. LeRoy, and negotiated the loan for her, but was not credited or responsible for the money himself, and therefore not the party and borrower; yet he was and is the husband of the true party and borrower. But whether he was the clerk and husband at the time she borrowed the money, or was then clerk and now her husband, can make no difference in the question upon his competency as a witness by virtue of the Act.

The Act makes it depend altogether upon two facts, his being the borrower, and being sued for the money; neither of which appears in the case, but the converse. The test and condition required by the Act, is then wanting, and the case *stands clearly at common law, which [*233
forbids the husband being his wife's witness when on or off the record.

Why is it said in some of the English cases that the husband cannot be the agent of his feme sole trader? It cannot be that she would not be bound by his acts adopted by herself, though done by him. But because her husband cannot verify or deny her acts, on oath, and he might through their moral union destroy her lawful free agency in sole trading, &c., in which he cannot be a partaker legally. In law they are incorporated and become as one person; yet, by law, she may be a sole trader. And to this limited extent, they are as two separate persons, and she a free trader. Our Act, by requiring the husband to be sued with the wife "*for conformity only,*" illustrates well this principle; upon which the whole argument turns. But if we suffer the form to perplex and alter the doctrine, we shall soon have irresponsible husbands trading

under the name of their wives, as well as husbands, clerks, swearing to usury for their wives, in cases where the husband was only agent to the wife, and not the borrower of the money under the Act, nor in any way liable for the loan. But quite a different argument was also urged, though I cannot think it was relied upon, as to the odium of usury. Usury is to be put down. Assuredly it is, in whatever shape we discover it, lurking in a contract of borrowing. But we are to come at, point out, and prove "such offence," as the Act calls it, by competent and lawful testimony; and the odious loan must be first made to appear before it can be punished. But in a case of express contract, as a note, or of vested rights, we are not at liberty, as this argument assumes, to conceive that there is something wrong, and therefore extend the strict provision of the Act, in order to destroy the contract. The odium of usury may be just. But the evidence of it, is as of strict law, as belongs to any other case; and there can be no odium before the charge is so proved. This argument then does not apply to the true question. I cannot, therefore, support the decision that held Mr. Le Roy a competent witness.

See 2 Rich. 2. *An.*

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*234] *THE CITY COUNCIL OF CHARLESTON *vs.* JOHN ELFORD, WHARFINGER.

To throw bales of cotton from the upper story of a cotton warehouse, (without the usual rope and tackle,) on any of the open spaces near such warehouses, where cotton is ordinarily exposed for sale, is a violation of the city ordinance.

Before his Honor the RECORDER, tried in the City Court.

This was an action to recover a penalty under an ordinance of the City Council, passed the ——— day of ———, A. D. ———.

It was admitted that the defendant had permitted ten bales of cotton to be thrown from a door in the third story of a store house belonging to Boyce & Co.'s wharf. The bales were thrown out on the south side of the storehouse into an open space ordinarily occupied by cotton exposed for sale. Through and over this space persons were continually passing to and fro. Taxes are paid for the vacant space, but not for the streets or ways.

The defendant was found guilty, and he appeals on the following grounds:

1. That his Honor charged the jury that this vacant space was within the meaning of the ordinance.
2. That the *locus in quo*, being a close, is not within the penalty of the ordinance.
3. That the verdict is in other respects against law and evidence.

Curia, per GANTT, J. The preamble to the ordinance recites that several distressing accidents have arisen from persons throwing, or permitting to be thrown, from the second or upper floors of warehouses,

stores and other buildings within the City of Charleston, cotton in bales, goods and other articles, and that it has become essential to the safety of the inhabitants thereof, to check and prevent such practices.

Ordains that any person or persons who shall throw, or permit or suffer to be thrown, from the second or upper floor of any warehouse, store or other building, or who shall lower, or permit or suffer to be lowered, out of the second or upper story of any such building as aforesaid, cotton in bales, goods or *any other articles, without a good and sufficient tackle and rope, shall, for every such offence, be fined in a sum [*235 not exceeding one hundred dollars nor less than fifty, &c.

It was admitted on the trial, as stated in the report, that the defendant had permitted ten bales of cotten to be thrown from a door in the third story of a storehouse belonging to Boyce & Co.'s wharf. On the trial of this case, it was contended in the defence, and is made a ground of appeal here, that as the bales were thrown out on the south side of the store house into an open space where cotton was ordinarily placed for sale, that the intendment of the ordinance was not violated; but it being admitted that over this space persons were continually passing to and fro, it would have been strange indeed if the Recorder had put any other interpretation upon the ordinance, than the one rendered. A bale of cotton falling on one traversing this plat of ground would prove as disastrous as if he was traversing the street, and the ordinance embracing all and every part of the City, there can be no doubt of its having been violated in this case.

The Court are unanimous in their opinion, that the Recorder's charge to the jury was correct, and that the defendant was properly found guilty by the jury,

The defendant can take nothing by his motion.

The whole Court concurred.

See *Chimney Sweep's case*, 11 Rich. *City Council* vs. , Chit. Jan. '59. *An.*

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*The State *vs.* George W. Jones. [*236

The words *warrant and order*, in an indictment for forgery, describing the instrument forged, are synonymous with *warrant or order*.

An instrument signed by a party, is, in legal parlance, the paper writing of such party. It is his signature which gives it that character and not the body of the instrument.

Every indictment for forgery, must set forth the instrument charged as fictitious, in words and figures, so that the Court may be able to judge from the record, whether it is an instrument in respect of which forgery can be committed.

If an indictment charges the forgery to be with intent to defraud an incorporated bank, and its corporate name is set forth, it is sufficient if it appears to be an incorporate bank within this State.

The cashier is a mere officer representing the bank, and a check drawn upon him as such is drawn upon the bank; therefore, a fraud committed on him, is a fraud upon the bank.

The same indictment set forth that the paper writing, alleged to be forged, pur-

ported to be a warrant and order for the payment of money, and to have been drawn by one Tristram Tupper. It then set out the instrument in *hæc verba*, from which it appeared that it was signed T. Tupper, and averred that the prisoner made it with the intention to defraud Tristram Tupper: *Held*, that there was no variance, and that the count was well framed.

If an instrument from its face purports to have been made in Charleston, S. C., and it is proved the prisoner at its date was there, and had the same in his possession, it is sufficient evidence to show that it was made there.

If a prisoner is guilty in fact of forgery, his conviction may be sustained either under the Acts of 1736–7, the Act of 1801, or at common law.

Before O'NEALL, J., at Charleston, May Term, 1840.

The prisoner was indicted in the 1st, 3d, and 5th counts, for the false making, and in the 2d, 4th, and 6th counts, for uttering and publishing, as true, the following paper:

"No. 73. *Charleston, S. C., February 19th*, 1840.

"Cashier of the Bank of Charleston, So. Ca., pay to Geo. W. Jones, or bearer, thirty-two dollars.

"$32 00. T. TUPPER."

It was proved that the prisoner came to Charleston on the 17th day of February, 1839; he boarded at a Mr. Harrison's. The night after he came, he applied to his landlord for the loan of $2, to go to the theatre; he pulled out the check, signed T. Tupper, on the Bank of Charleston, for $32, and offered it to him, saying, keep it for security, to-morrow I will collect it, get the money, and return it to you. Harrison *declined taking the check, as he thought there was something suspicious about it; he, however, loaned him the $2. The prisoner afterwards told him he had collected the check and spent the money. After the prisoner was arrested for grand larceny, his trunk was examined, and the check set out in the indictment was found in it; and Mr. Harrison identified it in Court, as the one offered to him.

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The check was fully proved to be a forgery. In Charleston there is but one man named Tristram Tupper; he is the President of the Hamburg Railroad; he sometimes, in small matters of business, such as orders for payment of bills against the company, signs his name T. Tupper. On more important matters, such as scrip, he writes his name Tristram Tupper. The prisoner, in the purchase of some clothes, on the 18th of February, from Mr. Flynn, passed by the name of Henry G. King; he ordered some clothes from Mr. Pemberton, on the 17th or 18th of February, by the name of George Ross.

Four objections were taken to the indictment; 1st. That the indictment describes the paper forged, to be a warrant *and* order; the Act of Assembly speaks of a warrant *or* order. 2d. The indictment describes the paper forged as a paper writing, when it was partly in print and partly in writing. 3d. That, according to the Act of 1801, and the case of the *State* vs. *Houseal*,(*a*) the party to be defrauded must be alleged to be within the State. 4th. The indictment alleged that the paper was forged with the intent to defraud one Tristram Tupper, and the paper was signed T. Tupper.

I thought there was nothing in these objections. As to the first, I

(*a*) 5 Stat. 397. *An.*

thought the words in the Act, "warrant or order," were used as synonymous, and to describe the same paper, and therefore, that the description in the indictment, by the words warrant and order, was good. To the second, I thought it a sufficient answer, that a paper partly in print and partly in writing, and signed, or purporting to be signed, by a person, was legally the paper writing of such person. As to the third, the case of the *State* vs. *Houseal*, (2 Brev, Rep. 219,) furnished the answer; the want of the allegation, that the party intended to be defrauded resided within the State, prevented the case from being covered by the Act of 1801; but without such allegation it was within the Act of 1736–7.(*a*) (P. L. 147.) The fourth objection, was one, I thought, dependant on the *proof. If it was shown that the paper forged, signed T. Tupper, was intended to represent Tristram Tupper, then the matter [*238 was well laid in the indictment.

The case then went to the jury, and they were instructed, that forgery consists in the false making of any one of the papers enumerated in the Act of Assembly, with the intent to defraud another; or in the uttering and publishing of such paper as true, knowing it to be forged. They were told, that the inquiries in fact for them were—1st. Did the prisoner falsely make the paper set out in the indictment, as the check of Tristram Tupper Here they were told, first, to ask was Tristram Tupper the person meant by T. Tupper? They were referred to the proof, that he was the only *man* in Charleston known to be thus designated; that his signature was sometimes T. Tupper, and sometimes Tristram Tupper; and that the prisoner said he would collect the check next day. If they were satisfied that Tristram Tupper of Charleston, was the person intended by T. Tupper, then there was no doubt that the paper was false. And then the inquiry would be, did the prisoner make it? The jury were referred to the facts that it was made payable to him; it was found in his possession; it was offered by him as a genuine paper to Harrison; his statement, that he afterwards collected it, when in fact it was still in his own possession; his bearing false names, and his want of money. If they were satisfied he made the paper, then the jury were directed to inquire, did he make it at Charleston? Here the jury were referred to the facts, that on its face it purports to be made at Charleston; and that the prisoner at its date was in the city. If these questions were all found against the prisoner, then the second inquiry would arise—did he make the paper with an intent to defraud another? They were told, if it was made without any intention of being used as genuine, then the fraudulent intention would be at once negatived, and the prisoner would be guiltless. But this ought to be manifest, before such a conclusion was adopted. For, generally, the false making of a paper, creating a liability on another, or conferring benefit on the maker, would be the evidence of a fraudulent intent.

They were told, if the offer to Harrison was with a view of raising money on the check, either by passing it away, or depositing it as security for money loaned, it would show *that the instrument had been forged with a corrupt intent. And when it was thus shown that it [*239 was intended to be used as a money security, it was in contemplation of law

(*a*) 3 Stat. 470, § 3.

in fraud of Tupper and the Bank of Charleston. For a draft on the cashier of the Bank of Charleston, was a draft on the Bank. The effect of such an order was to withdraw the drawer's funds from the Bank; and if forged, the Bank could not credit his account with the payment; and hence, therefore, the Bank would be defrauded by such a forgery, although it might have a remedy even against the officer. In an indictment for forgery, it was not necessary to make the party guilty, that his intended fraud should be fully consummated, by obtaining money, or money's worth, on the paper forged; it was sufficient if the fraudulent intent with which the paper was forged, was made out. The jury found the prisoner guilty on the first, third, and fifth counts, for forging the check; but acquitted him on the second, fourth, and sixth grounds, for uttering and publishing the check as true, knowing it to be forged. As to this branch, I do not therefore report my charge. The prisoner moves for a new trial, and in arrest of judgment, on the annexed grounds:

GROUNDS OF APPEAL.

1. Because the indictment in the 1st, 3d and 5th counts, is defective, inasmuch as the words of the act are "warrant or order," in the disjunctive, and the words in the counts are "warrant and order," in the conjunctive; the words are not synonymous.

2. Because, in these counts, the forging is alleged to have been of a "certain paper writing," and proof was of a paper partly written and partly printed.

3. Because those counts are still further defective, inasmuch as they do not set forth that the party whom it is intended to defraud, if a corporation, was in the United States, or within this State; or, if a person, was resident in this State, or within the United States,

4. Because the first count is still further defective, as it alleges the intention to defraud the Bank of Charleston, S. C., and the tenor of the check shows that it was a check upon the cashier of the Bank of Charleston, S. C.

5. Because the third count is further defective, because the purport and the
*240] tenor of the check in the count are at variance; *the purport being that it was the check of Tristram Tupper, and the tenor showing that it was the check of T. Tupper.

6. Because the same count was further defective, alleging that it was to defraud Tristram Tupper, and the tenor of the check showed that it was the check of T. Tupper.

7. Because there was no proof where the check was forged, and the jury was instructed that if they believed the prisoner made the paper, the date showed where he made it.

8. Because his Honor charged the jury, that the prisoner might be convicted under the Act of 1801, or 1736, or the common law, although the offence was charged to be against the Act of Assembly, &c.

Simmons, for the motion, cited 3 M'C. 383; 2 Brev. 262; 3 Tom. L. Dic. 761; 6 Jacob. *ib.* 387, 388; 4 Tuc. Blac. 249, (note,) Acts, 1736–7, P. L., 147; Acts 1801, 2 Faust. 379. Was the indictment framed under the Act of 1801? Cited also, 2 Bos. & Pul. 238; 2 Mason U. S. R. 464. Nothing would make a printed paper a written paper. Suppose the prisoner had been acquitted, and subsequent to his acquittal, a paper had been found wholly written, could he plead his acquittal? He could not. The prisoner could not, in such a case, apprehend what he was to answer.

An indictment undertaking to recite, and not doing so, produces a fatal variance. Mr. S. contended that there was a difference between the Acts of 1736 and 1737, and the Act of 1801. Cited *The State* vs. *Houseal*, 2 Brev. 219. It is as

essential that an indictment should set out that the person named in the indictment resided in the State and in the United States, as that he forged or assisted in forging.

The offence of forgery is only made capital by statute. Under the fourth ground, cited 2 Starkie Ev. 336; 3 Brev. Rep. 507, *State* vs. *Waters*. An error in a single word is fatal. Fifth ground, 2 Leach. Ch. Cases, 808; 2 Starkie Ev. 331; 2 E. P. C. 992.

Bailey, Attorney General, contra, on the first ground, cited 1 Brev. Rep. 35. As to the place where made, 2 Russel on Cr. 373; Foster's case, 3 M'C. 442. The first count is good *under the Act of 1801. He cited 2 Brev. 262, *State* vs. *Crank*, 2 Bail. 66. [*241

Wilson, in reply, said that forgery, at common law, was the counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced. First, the forgery must be proved to be in the country, and made by the party, and his handwriting proved. The bare fact of finding the instrument in the country at the time, and the defendant, is not *prima facie* evidence that he forged it in that country. *Rex* vs. *Park & Brown*, Starkie, 231; 2 East, P. C. 992. If an intent to defraud a corporation be alleged, an intent must be proved to defraud them in their corporate capacity; and if an attempt to defraud several in their individual capacities, be alleged, and it should appear that the real intention was to defraud them in their corporate capacity, the variance will be fatal. E. P. C. 991. A warrant of attorney to forge, is forgery. *Faris'* case, 1 Raym. 81; 2 Brev. 219, as to recital of words. As to the printing and writing, 2 B. & P. 238; 1 Brev. 25. Warrant or order, 2 Bail. 66; 2 Russ. 373; 3 M'C 441; 5 Pickering's Rep. 279; 2 Devereaux N. C. 444; 2 Southard, 744.

Curia, per O'NEALL, J. The different grounds of the prisoner's motion have received from the Court a deliberate consideration, and it is now my duty to give the judgment upon them. This shall be done in as few words as possible.

The first ground objects to the manner in which the indictment describes the instrument forged, "a warrant and order," when the Acts of 1736–7, and of 1801, speak of "a warrant or order." I had, on the trial below, and I have now, no doubt that the indictment sets it out properly. The Legislature employed two words to describe the same thing. A warrant for the payment of money or the delivery of goods, is an order, and an order for the same purpose is also a warrant.

Indeed, the manner in which they are used in the Acts: "Any warrant or order for the payment of money or delivery of goods," shows that one instrument was intended to be described. The same thing is supposed to be accomplished by either, and hence having the same effect, they must have the same meaning. They are synonymous, and have been always so regarded. In *The State* vs *Holly*, (1 Brev. 37,) decided in 1800, *by Waties, Bay, Johnson, Ramsey, and Trezivant, it was said, "that the obvious meaning of the words 'warrant or order' in the [*242 sense used in the indictment, cannot be fairly misunderstood, the words being evidently intended to express the very same thing." And they held, although in that case they were used disjunctively, "warrant or order," yet that the indictment was good. It is clear, beyond all doubt, if they mean the same thing, they ought to be laid conjunctively, and using them otherwise might be objected to.

The second ground objects that the forged instrument is described as a "paper writing," when it is partly printed and partly written. There is unquestionably nothing in this ground. An instrument signed by a

party is, in legal parlance, the paper writing of such a party. It is his signature to it which gives it that character, and not the body of the instrument. In a declaration on a note of hand, it is described as a note in writing, although every word, except the signature, may be in print. So of a bond partly written and partly printed, it is said to be "the writing obligatory" of the party executing it The manner in which an instrument forged is to be set out is well settled. In 3 C. L. 1040, it is said "every indictment for forgery must set forth the instrument charged as fictitious, in words and figures, so that the Court may be able to judge from the record, whether it is an instrument in respect of which forgery can be committed." This rule is fully complied with in this case, for the warrant and order is exactly set out. The same author, at the same page, says "though it is sufficient to aver that the defendant forged a certain writing, describing it truly, and setting forth its tenor, it seems more proper to lay it as a certain paper writing, purporting to be one that the statute on which the indictment is framed, describes." The instrument in this case is described in the very words used in this case. I have looked into *Waters'* case, 3 Brev. (507, An.,) and have been permitted to examine the indictment on file in the clerk's office; the bank note in that case was not described as partly printed and partly written. That indictment was drawn by Mr. Justice Richardson, then Attorney-General, and the prisoner defended by Mr. Wilson, one of the counsel for the prisoner now before us. No objection was taken to the indictment on that account. The only case in which I have observed that the
*243] instrument was *described as partly printed and partly written, is the case of *Rex* vs. *Wilcox*, 1 Eng. Crown Ca. 50.) In that case the judgment was notwithstanding arrested, because the indictment did not state what the instrument was of which the forgery was alleged to have been committed, nor how the party signing it had authority to sign it.

The third ground insists that the indictment does not set out that the party whom it is intended to defraud, if a corporation, was in the United States, or within this State, or if a person, was resident in this State, or within the United States. This particularity is supposed to be necessary, under the Act of 1801, (2 Faust, 379,) which in the first section provides "that if any person, from and after the passing of this Act, shall, within this State, falsely make, forge or counterfeit, or willingly act or assist in the false making, forging or counterfeiting, of any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money or delivery of goods, bank note, for payment of money, of any incorporated or unincorporated bank or company within this State or any of the United States, or any endorsement or assignment of any bill of exchange or promissory note for payment of money, or of any bank note for the payment of money, of any incorporated or unincorporated bank or company within this State or any of the United States, or any acquittance or receipt, either of money or goods, or any acceptance of any bill of exchange, or the number or principal sum of any promissory note or bank note, for the payment of money, of any incorporated or unincorporated bank or company, in this State or any of the United States, or the number or principal sum of any accountable receipt for any note, bill or other security for the payment of money, or any warrant or

order for the payment of money, or delivery of goods, with intention to defraud any person or persons residing or being within this State or any of the United States, or any bank or company, corporated or unincorporated, within this State or any of the United States, or the President or any other officer of any such bank or company, then every such person, being lawfully thereof convicted, shall be deemed guilty of felony, and shall suffer death, as a felon, without benefit of clergy." Two questions here arise, under this Act; 1st. Is it necessary to set out the indictment that the bank or person intended *to be defrauded, is within this State, or some other of the United States; 2nd. Is [*244 the Act of 1801 a repeal of the Act of 1736–7? and if it is not, are not the 3d and 5th counts good under it? and the 1st count under the Act of 1801? admitting it to require that the bank to be defrauded should appear, from the indictment, to be in this State, or some other of the United States. In passing upon the first question, I would first remark that on examining Waters' indictment, it seems that the learned attorney who drew it, alleged that the bank note then forged, was so forged with intent to defraud an incorporated bank within this State, and in another count a person within this State. This is the only precedent to which I have had access, and as that offence had to be covered by the Act of 1801, or not be punished capitally, I have no doubt it was so cautiously drawn from the decision in *Houseal's* case, to which I shall presently refer. My brothers, Evans and Earle, and Chancellor Johnson, who long filled the office of Solicitors, agree that no such particularity was resorted to by them. In Houseal's case, (2 Brev. 219,) the Judges held that "the offences charged in the indictment, are not pursuant to the Act of Assembly of 1801, and are not within the scope or intent of that Act, because the persons intended to be defrauded are not stated to be within any of the United States." This, I confess is a decision on the point now before us, although it is not, perhaps conclusive authority, inasmuch as that point was not necessary to the decision of the cause. That decision out of the way, I should not hesitate to say, that there is no necessity to set out that the bank or person intended to be defrauded is within the State. It is no portion of the definition of the offence; and when a forgery is charged to be in fraud of a bank, or an individual, it is to be inferred that they are within the State, unless the contrary be alleged. If the proof does not correspond with the indictment, as understood or expressed, the prisoner would be acquitted. But I yield my own judgment to that decision, and it is therefore necessary to inquire whether the Act of 1801 is a repeal of the Act of 1736–7. Act of 1736–7, sec. 3, (P. L. 147.) The latter is more general in the respect in which we are considering it than the former. It provides, *inter alia*, that "to falsely make, forge or counterfeit any warrant or order for the payment of money or delivery of goods, with the intention to defraud any *person," shall be a felony. By comparing the two Acts, it will be found that that part of the Act of 1801 which relates to banks [*245 and companies, corporated or uncorporated, is not within the Act of 1736–7; and that the Act of 1801 is more restricted as to the person to be defrauded than the Act of 1736–7. The Act of 1801 contains no repealing clause, and can therefore, only be a repeal of the former Act, by implication. This is not favored, and unless there was some

contradictory or repugnant provisions, there cannot be any implication of repeal. There is nothing of this kind; the two Acts may well stand together; the latter applying to its peculiar subject, and the former governing those falling within its provisions. They cannot be construed in *pari materia*, for they do not entirely relate to the same subject matter. This point, however, was expressly adjudged in Houseal's case, (2 Brev. 222,) and if that case is authority for the precision with which the offence must be laid, under the Act of 1801, it must also be for the non-repeal of the Act of 1736–7. In it, the Judges said, it does not appear to us that these two Acts are repugnant or contradictory, or so inconsistent as that they may not well stand together. The latter, to be sure, is more limited and confined in its operation, than the former; but there does not seem to be any necessity for construing this latter so as to operate the repeal of the former; nor would there be any propriety in so doing. The Acts of Congress of 1790 and 1819, were passed on the same subject, (piracy;) they differed in some of their provisions; they were both held to be in force; Klintock was adjudged to be within the Act of 1790, and Smith within that of 1819, (5 Wheat. 144, 153.) The Act of 1736–7 being in force, the 3d and 5th counts are so framed as to bring the prisoner within its provisions, and, as was ruled in Houseal's case, his conviction on those counts must be sustained under it.

The first count, however, charges the forgery to be with intent to defraud the Bank of Charleston, South Carolina, and this must be sustained under the Act of 1801, or fail. I think, however, that this count is sufficiently framed to be supported under that Act. It is sufficient, if it appear to be an incorporated bank within this State. The Bank is described by its corporate name, the Bank of Charleston, South Carolina, which sufficiently shows that it is a bank within this *State. It is, too, incorporated by a public Act, and we are judicially to take notice and be informed of this fact, and there is, therefore, no necessity for more than the designation of the bank by its name. The first count is therefore sufficient.

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The fourth ground contends that the first count is defective, as it alleges the intention to defraud the Bank of Charleston, and the tenor of the forged warrant and order for the payment, shows that it was made to defraud the cashier. There is nothing in this ground. The intent of the forged writing is to withdraw the funds of the supposed signer from the bank, and this makes it a fraud intended upon it. The cashier is a mere officer representing the bank, and a paper drawn upon him as such, is drawn upon the bank. If the teller had paid the forged warrant or order in this case, the bank must have lost the credit of so much in a settlement with Mr. Tupper, the supposed drawer. It may be that the bank might have compelled the officer making the payment to refund, and thus replace its loss. Still this does not prevent the fraud from being of the bank and not the officer.

The fifth ground alleges that the third count is defective, inasmuch as it supposes that it sets out the forged writing as purporting to be of Tristram Tupper, when the tenor shows that it was of T. Tupper. This ground was framed upon the fourth ground, which was sustained as fatal to the indictment, in Houseal's case. But unfortunately for the prisoner, his ground here is founded in mistake; the indictment in the third count

does not set out the paper writing as purporting to be the warrant and order of Tristram Tupper, but as purporting to be a warrant and order for the payment of money, and then sets out in *hæc verba*, and avers the prisoner's intention to be to defraud Tristram Tupper. There is no variance here, and the count is well framed.

The sixth ground is a mere variety of the fifth, and was intended to apply to the facts. The jury found that the paper signed T. Tupper, was intended to represent Tristram Tupper, and thus to defraud him, and the proof too well sustains their conclusion.

The seventh ground supposes there was no proof where the warrant and order was made. It is only necessary to read and understand the report, to see that here again the prisoner *has no just ground of [*247 complaint. Two facts were ascertained; it purports to be made in Charleston, and the prisoner was in Charleston at its date, and had it in possession. These were enough to show where it was made.

The eighth ground supposes there was error in saying to the jury, that if the prisoner was guilty in fact, his conviction might be sustained under the Act of 1736–7, the Act of 1801, or at common law. There certainly cannot be any doubt upon this, as a legal proposition, but as it is questioned, in proof of its accuracy, I will refer to Houseal's case, (2 Brev., 219,) and to Foster's case, (3 McC., 442.) The prisoner's motion is dismissed.

EVANS, EARLE and BUTLER, JJ., concurred. GANTT and RICHARDSON, JJ., dissented.

See 3 Rich. 172. *An.*

B. F. SHAW *vs.* W. J. DAWSEY.

The will of a feme covert is void at law, and the Court of Common Pleas, acting as a Court of Appeals from the Ordinary, cannot entertain the question of executing a will under a deed of settlement. This is a question purely for the Court of Equity.

Before O'NEALL, J., at Georgetown, 1840.

This case was an appeal from the Ordinary, on the probate of the will of Elizabeth Shaw. Mrs. Shaw was a married woman when she executed her will, but her executors claimed that under and by virtue of a deed of settlement, she was authorized to dispose of her property by a will, or deed in nature of a will, and the Ordinary sustained the will. On the case coming on for trial, his Honor ruled that the fact that testatrix was a feme covert, at the execution of the will, rendered it void at law, and that the Court of Common Pleas, acting as a Court of Appeals from the Ordinary, could not entertain the *question of her executing [*248 a will under a settlement, which was purely a question for the Court of Equity, and so reversed the decree of the Ordinary without inquiry. The ground of my decision is not presented by this brief. The fifth section of the Act of 1734, (P. L., 139,) has the following provision: "Provided now, and at all times, that any will or testament, made, or to be made, by any feme covert, idiot, or any person of non-sane memory,

shall not be good or valid in law, any thing hereinbefore to the contrary notwithstanding." By this, it seemed to me, that it was impossible to set up the will of a feme covert as such. If it is operative at all, it is as the mere execution of a power, and this becomes part of the deed. The Ordinary's decree, admitting it to probate, as a will, was ruled to be erroneous, and the jury found against the bill.

GROUND OF APPEAL.

That the Act of the Legislature making the Court of Common Pleas an appeal from the tribunal of the Court of Ordinary, by necessary implication has clothed it with all the powers and jurisdiction of the Court of Ordinary, and also the powers necessary and proper to make such final decree as the nature of the case may require; and so he submits the powers under the deed were matters for the consideration of the Court.

Curia, per O'NEALL, J. In England, I concede, the will of a feme covert, in execution of a power, must be proved in the Spiritual Court, before the Court of Equity will read it. (Sug. on Po., 329. But I do not understand that such a Court has original jurisdiction of the probate of such a will. It is only when such a paper is presented to the Court of Equity, that it is sent down to be there proved. If, however, a different practice there prevailed, the Act of 1734, (P. L., 139,) compels us to adopt it here. For it provides "that any will or testament made, or to be made, by a feme covert, idiot, or any person of non-sane memory, shall not be good or valid in law, any thing hereinbefore to the contrary notwithstanding." It is impossible for a Law Court to say that a paper declared by an Act of the Legislature to be void, is still to be proved and allowed to have legal effect. It can neither operate as a will or tes-
*249] tament. But in equity, it will be allowed, (if it has in *other respects the legal requisites,) to operate as an execution of the power contained in the deed of marriage settlement. That Court may send it down to be proved before the Ordinary, if they think it can be regarded as an execution of the power.

The motion is dismissed.

The whole Court concurred.

B. F. Hunt, for the motion. ———, contra.

See *Ward* vs. *Glenn*, 9 Rich. 127; *Hood* vs. *Archer*, 1 McC. 477; *Converse* vs. *Converse*, 9 Rich. Eq. 535. *An.*

O. D. ALLEN, ORDINARY, *vs.* BURTON and HARLLEE, ADMINISTRATORS.

The sureties to an administration bond are not liable to the heirs at law for the rent of land belonging to the estate of which their principal was the administrator, under the special circumstances.

Before EVANS, J., at Barnwell, Fall Term, 1840.

It appeared from the evidence that one George Bruton died many years ago, and one Charles Dewitt administered on his estate. Benjamin Bruton, the defendant's intestate, was one of Dewitt's sureties to his

administration bond. The distributees of George Bruton filed a bill against Dewitt to account. The accounts were made up by the Commissioner, who reported a large balance due by Dewitt to the distributees of George Bruton. The report was confirmed, and this action was on the bond to the Ordinary, for the amount of the decree. On examining the Commissioner's report, it appeared that the Commissioner had charged Dewitt with the rent of the land belonging to his intestate's estate. This item was objected. But it was finally agreed the plaintiff should take a verdict for the amount of the decree, including the land rent, subject to the opinion of the Appeal Court, on the question *whether the security on the administration bond was liable for it. [*250

Northrop, (for *Bellinger*,) for the motion, said, the only question for the Court was, whether an administrator is liable for the rents of the lands of his intestate. All the authority which an administrator acquires over his intestate's real estate is derived from the Ordinary. He contended that it would be a confusion of the offices of administrator and guardian, if the one was permitted to interfere with the powers of the other. Cited P. L. 202 and 217.

There was a distinction, said Mr. N., between guardians and administrators.

If the administrator is not liable for rent, neither can his surety be, 3 McC. 417; 1 Bail. 461.

Patterson, contra, said, at common law, an administrator had no right to interfere with the real estate of his intestate; but, by *indirect* legislation, we have gone far towards conferring that power, by the Act making real estate liable for the payment of debts in the hands of the administrator. At common law, the real estate goes to the heirs at law, the personal estate to a different person. Mr. P. contended that in the Courts of Equity, administrators were called on to account for rents, and the sureties should be made liable for rents collected by their principal as administrator, or legislation should be had on the subject.

Northrop, in reply, cited 2 Hill Law Rep. 581. Unless the estate be in debt, the administrator has nothing to do with the real estate.

Curia, per EVANS, J. The question which we are called upon to decide in this case is, whether the securities of an administrator are liable to the heirs at law, for rent of land belonging to an estate of which their principal was the administrator. The duties of an administrator, as prescribed by law, seem to relate entirely to the personal estate. It is, as his bond speaks, only of the goods and chattels, rights, and credits. Generally speaking, we are to resort entirely to the contract which creates a liability, in order to ascertain what that liability is. *Taking this as our guide, it would seem the securities do not undertake to become responsible for the acts of their principal in relation to the real estate, and consequently are not chargeable with his default in this particular. In England the law casts the land, on the death of the owner, immediately on the heir. The administrator never meddles with it. In this country, these two descriptions of property are more united. Estates generally in the county consist of land and negroes, and they cannot, in general, be disunited, without materially impairing the value of both; hence, it is almost universal, that the administrator continues the farm as he found it, and the profits arising from both the land and the personal estate come into his hands in the proceeds of the crops; sometimes he hires out the negroes and rents the land, and then the land rent is received by him in money. How far his securities [*251

would be responsible for the money thus received, I believe has never been decided in this State. I do not propose either to discuss or to decide the question. It is not involved in this case. Here Dewitt was one of the heirs, and a tenant in common with the other. He was also the guardian of the other heir;(a) his use of the land is referable to these characters, rather than to his character as administrator, and it appears from the decree in equity, that it was as guardian he was ordered to account for the land rent.(b) Under these circumstances we are of opinion the defendants are not liable for that part of the decree. The motion for a new trial is therefore granted, unless the plaintiff shall release so much of the verdict as includes the land rent which Dewitt was decreed to pay by the order of the Court of Equity.

The whole Court concurred.

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*252] *JOHN SEIGLING *vs.* WILLIAM R. MAIN.

The wife of a tenant is a competent witness between the landlord and a third person.

The Act of 1827 makes the action of trover, commenced under its provisions, a proceeding *in rem;* and when a writ is issued and served, the chattel is in the custody of the law and cannot be distrained for rent.

Before O'NEALL, J., at Charleston, May Term, 1840.

This was an action of trover, for the recovery of damages for the conversion of a piano forte.

It appeared that a man of the name of Taylor, having a wife then alive married a Miss Horton; after their marriage they rented a house belonging to the defendant. They lived together for some time, when Taylor abandoned his second wife. In the early part of November, Miss Horton, (alias Mrs. Taylor,) left the demised premises; there was then twenty-four dollars rent due, in payment of which she and her mother swore that the defendant accepted a bureau worth twenty-six dollars. When she left the premises, she left the bureau and the piano forte; the latter, they swore, she did not buy from the plaintiff, but that it was, by him hired to her at four dollars per month. In this respect she was corroborated by the plaintiff's clerk, Mr. Ulrick, who proved that she hired the piano forte in the month of May. She was contradicted by Tenent, Singletary and Mr. Main, the son of the defendant, all of whom proved that they had heard her say she had paid one hundred and seventy-five dollars or one hundred and seventy dollars for it, and young Mr. Main and Singletary both said, that she said, she had left it in pawn for the rent. The plaintiff demanded the piano forte from the defendant; he refused to give it up, unless twenty dollars rent was paid; the plaintiff made the affidavit required by the Act of 1827,(c) and issued a bail writ, in trover, which was executed by the defendant entering into the bail bond required

(a) See 2 Hill, Ch., 370.
(b) See Supra, 91, and cases in order there. *An.*
(c) 6 Stat., 237. *An.*

by the Act, on the 6th of December, 1839; subsequently the defendant executed his distress warrant, (which he had previously issued,) and seized and sold the piano forte for the rent which he alleged to be in arrear. The value of the piano forte was proved to be from one hundred and fifty dollars to one hundred and seventy dollars. When Miss Horton, (alias Mrs. Taylor,) was offered as a witness, she was objected to by the defendant, on the ground that she was the wife of the tenant. I thought she was admissible, on two grounds, 1st. according to* her own proof, she was not the wife of Taylor. 2nd. If she was [*253 his wife, still she was competent. For he had no interest in the event of this suit. The recovery here by the plaintiff would not be evidence for him, that there was no rent in arrear. If the defendant succeeded, then indeed it would show, that the rent was satisfied by the sale of the piano forte; but in that point of view, Taylor, would, in testifying for the plaintiff, be testifying against his own interest, and the defendant could not, therefore, object to him. The case of *O'Farrell* vs. *Nance*, (2 Hill, 484,) is full to the point, that the tenant is a competent witness, between the landlord and a third person. If the husband would have been competent, it followed that the wife must also be.

The jury were instructed, 1st, to enquire, was there any rent in arrear. If Miss Horton, (alias Mrs Taylor,) was believed, it was paid by the delivery of the bureau. The question of her credit was distinctly submitted to the jury, and her testimony was contrasted with that contradicting her. If there was no rent in arrear, it would be only necessary then to inquire—to whom did the piano belong, and how much was it worth? Here again, the case depended on the credit of Miss Horton, (alias Mrs. Taylor,) and Mr. Ulrick, as compared with the testimony of the defendant's son, Messrs. Tenent and Singletary. If the jury should conclude, 1st, that there was rent in arrear, and 2d, that the piano forte was the property of the plaintiff, then it would be necessary to enquire, had the landlord the right to seize and sell it under his warrant of distress, after the service of the writ in trover? I thought he had not. The Act of '27 makes the action of trover, commenced under its provisions, a proceeding *in rem* (*a*) So soon, therefore, as the writ was issued and served, it had the effect of placing the chattel in the custody of the law; and in that point of view, it was not the subject of distress. It was a mistake to suppose, that the landlord has any lien on the goods of a third person, upon the demised premises; he may, while they remain, distrain them for rent arrear. But if he prevent their removal, and thus compel the owner to have them on the premises, he could not take advantage of his own wrong and distrain them. So, too, if he convert them to his own use, he cannot afterwards recur to his own right of distress. In any of these points of view, I thought the plaintiff, on this question, entitled to *recover. The jury found for the plaintiff, [*254 the value of the piano forte, with interest from the time of conversion.

The defendant appeals, on the annexed grounds:

GROUNDS OF APPEAL.

1. His Honor, the presiding Judge, refused to exclude the wife of the tenant

(*a*) 2 Sh., 34; 1 Strob., 239; 3 Hill, 12. *In.*

but permitted her to testify and swear off the debt to the landlord, and was therefore interested.

2. His Honor erred, in charging the jury, that although the articles distrained were in the house hired by the tenant, and the house and articles in the house then (at the time of the demand) in possession of the landlord, there was no lien existing upon the articles, and the levy of the distress warrant could only create such lien.

3. The verdict was against law and evidence.

Wilson, for the motion, said that the wife of the tenant was an incompetent witness to give evidence between the landlord and a third person. He cited 2 Term Rep., 263; 4th *ib.*, 678. Trover, he contended, was an action of trespass, and not a proceeding *in rem*. Until the rent is paid, (when due,) the lien of the landlord is unimpaired. The lien of the landlord does not attach without a distress warrant. *McWillie* vs. *Hudson*, 1 Tread. Con. Rep., 119; 3 C. & P., 558.

Rice, contra, contended that the tenant was a competent witness to give evidence between the landlord and a third person, and it followed, of course, that if he was, the wife would also be. Here the witness was not the wife of the tenant and could not be excluded.

Curia, per O'NEALL, J. The Court is satisfied with the decision of the case below.

The point ruled as to the competency of the witness, and the instructions of the presiding Judge, are regarded as right by this Court. The motion is dismissed.

The whole Court concurred.

CASES AT LAW

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA.

Columbia, May, 1841.

JUDGES PRESENT.

HON. RICHARD GANTT,
" JOHN S. RICHARDSON,
" JOHN BOLTON O'NEALL,
HON. JOSIAH J. EVANS,
" ANDREW PICKENS BUTLER.

Mr. Justice EARLE was absent, holding the Circuit Court of Common Pleas in Charleston.

LEROY SECRIST, SHERIFF, *vs.* H. TWITTY.

A Sheriff's execution book is, on account of its official character, received in evidence, as proving in general the official entries contained in it. So, too, an entry on an execution is admissible in evidence as part of the record.

The entry of the sale made by the Sheriff, containing the name of the purchaser, is as effectual a signing, as if the Sheriff had written the name of the purchaser to a formal contract.

Before EARLE, J., at Lancaster, Fall Term, 1840.

This was a summary process to recover the amount or price of a tract of land, bid off at sheriff's sale by the defendant.

The levy on the lands in question, with a sufficient description, was endorsed on the execution, under the hand of the sheriff, and was also entered in the same words in the execution book. There followed an entry in these words: "J. R. *Hudson's land bought by Hiram Twitty, at forty-two dollars." This was not signed by the sheriff. [*256 Hudson's land was a portion of the land levied on and described in a former entry. The Court thought the note in writing insufficient, under the statute of frauds, and ordered a nonsuit.

The plaintiff appealed, on the ground:

That the entry in the execution book, in connection with the entries on the execution, were a sufficient note in handwriting, within the provisions of the statute of frauds, to enable the plaintiff to recover.

Curia, per O'NEILL, J. Before the Act of 1839, p. 42,(*a*) there was no law which required the sheriff to keep a sales book. It may be since the passage of that Act, that to charge a purchaser, at sheriff's sale, the entry must be found in the book thus directed to be kept. The sales in these cases were before the passage of that Act, and must be decided without any reference to it.

The cases of *Hall* vs. *O'Hanlon*, (2 Brev. R. 46,) and of *Gardner* vs. *Saunders*, (*ib.* 180,) in supporting sales made by the sheriff, referred to the vendue Act, and in analogy to it, it was said that "sheriffs who keep regular books, and accounts of sales, and are public officers, acting under the sanction of an oath, and the confidential servants of the community, may be fairly considered as *quasi* vendue masters, in relation to their sales under execution." In *Minter* vs. *Dent*, (2 Bail. 292,) it was held that the provisions of the vendue Act, requiring seven days' notice of a re-sale, did not apply to sheriff's sales. From that case, as well as the case of *Day* vs. *Hendrix*, decided in 1830, it will be seen, that the Court attached no other importance to the vendue Act, than as in support of the common law rule, that an auctioneer is an agent of the vendor and vendee, so as to bind them by the entry of sale. *Meadows* vs. *Meadows*, (3d McCord, 458.) In the Court of Equity, the sales by the commissioner, or master, are very analogous to sales made by the sheriff at law. In that Court, in the case of *Gordon* vs. *Saunders* and others, it was ruled, that where the commissioner kept no sales book, a sale of land made by him, and entered upon a loose slip of paper, which had been lost, should be enforced, (2 McC. C. R. 164.) That *case goes much further than the cases now before us. For here the entries are found in the sheriff's execution book. This was as much as could be asked, even under the vendue Act; for that Act only requires the sale to be entered in the books of the vendue master. If the sheriff is a vendue master, his execution book, before 1839, was quite sufficient for his entry of sale. But I think, as I have before said, that no other importance should be attached to the vendue Act, in this class of cases, than as furnishing a reason why we should support, at common law, sheriff's sales, when evidenced by a written entry made by the sheriff. The entry of the sale on the execution being a proper return to it, might, I think, before 1839, be very properly regarded as a sufficient entry to bind the purchaser. For in the absence of any other law, requiring a different entry, the statute of frauds would be satisfied by such an one.

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I do not think, that to make the former purchaser liable, the re-sale was required to be entered. It is sufficient if a re-sale has in fact been made, and complied with; for the purchaser's liability depends on the sale to himself; if that be sufficiently entered, he is charged upon it. The re-sale is only resorted to, to ascertain the damages sustained on the sale by the purchaser's failure to comply. That made, and complied with, might be proved even without an entry. The note or memorandum required by the statute, is sufficiently signed, if the name of the party to be charged is signed by himself, or by some one authorized by him. The entry of the sale made by the sheriff, containing the name of the purchaser, is as effectual a signing, as if the sheriff had written the name of

(*a*) 11 Stat., 37, § 6. *An.*

the purchaser to a formal contract to buy. The sheriff's execution book is, on account of its official character, received in evidence, as proving, in general, the official entries contained in it. So, too, an entry on an execution is admissible in evidence, as part of the record.

The motions to set aside the nonsuits are granted.

The whole Court concurred.

Wright and *McMullan*, for the motion, submitted the case, (after reading the brief) without argument.

J. Z. Hammond, contra, was absent.

See *Christie* vs. *Simpson*, 1 Rich., 408. *Elfe* vs. *Gadsden*, 2 Rich., 378; 1 Strob., 230. *Yongue* vs. *Cathcart*, 2 Strob., 222; 3 Strob., 306. *An.*

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*Mary Cain, Executrix, *vs.* R. R. Spann, [*258

He who takes a note, after it is due, takes it subject to any defence which the maker can set up against the payee; and when the action is in the name of an endorser or bearer, to entitle the defendant to set up, by way of discount, any matter between him and the payee, he must prove that the note was transferred after due, and that the matter of defence existed between them at the time of the transfer.

Before Earle, J., at Sumpter, Spring Term, 1841.

Assumpsit on a note of hand of defendant, dated 17th January, 1837, payable to John Ramsay, or bearer, for $325 63, due at one day, and transferred, after due, to the plaintiff's testator. The defendant offered by way of discount under notice, a note drawn by Ramsay, 19th December, 1838, payable to L. M. Spann, or bearer, due at one day, and transferred to defendant, 7th January, 1839. The time when the note sued on was transferred by Ramsay to the plaintiff's testator, was not proved. It was still in Ramsay's hands as late as the 25th December, 1838, and after the date of his note to L. M. Spann. There was no proof that he retained it, when the latter note was transferred to the defendant; much less was there any proof of an agreement, or understanding, between Ramsay and the defendant, that the notes should be discounted, the one against the other. Without such proof, and without knowledge on the part of the plaintiff's testator, when he obtained the note from Ramsay, that there existed any counter claim by way of discount, I held that the fact of the note sued on being transferred after due, had no other effect than to enable the defendant to avail himself of the want or failure of consideration, or of some equitable defence arising out of the transaction on account of which the note was given, and did not enable the defendant to set up by way of discount, any other separate and independent demand, which he might have or acquire against the payee.

The plaintiff offered in evidence a letter of 31st January, 1840, from the defendant to the plaintiff herself, or her testator, asking forbearance, and promising to pay.

The jury, under the instructions of the Court, found for the plaintiff, disallowing the discount.

The defendant appeals on the following grounds:

*259] *1. Because his Honor erred in charging the jury that the note of John Ramsay, the payee of the note sued upon, could not be set up as a matter of discount in the said action.

2. Because his Honor charged the jury that, even admitting the plaintiff's testator received the note from John Ramsay, after the note of Ramsay had been transferred to defendant, the defendant could not set it up as a discount.

3. Because the note sued upon, having been transferred after due, the defendant had a right to the discount offered, and his Honor should have so charged the jury.

Moses and Miller, for the motion, contended that the question in this case was, whether the discount offered by defendant, is a discount under the discount law.

The defendant stands in the same position that he would, if he had been sued by the original payee. Cited in support, 3 Term Rep. 82; 7 *id.*, 429, *Brown* vs. *Davis;* also 3 Kent, 91; Chitty on Bills, 143; *McCaskill* vs. *Ballard*, decided at May Term, 1832, at Columbia; 7 Term Rep., 430; 5 John., 118, *O' Callaghan* vs. *Sawyer:* 9 John., 244. The endorser takes the note subject to all the equity and all the discounts that the party might offer against the original payee; 8 John., 454; *Nixon* vs. *English*, 3 McCord, 549; *Perry* vs. *Mays*, 2 Bail., 354.

De Saussure and Garden, contra. The question arises strictly under our discount law, and we contend that there are no reported cases settling the question.

It does not appear that the discount note was traded prior to the transfer of the note sued upon. Cited *Williams & Co.* vs. *Hare*, 2 Hill, 483; *Lowry* vs. *Williamson*, 3 McCord, 247 and 249. Cited also, the Discount Act. *Kenedy and wife* vs. *Cunningham*, Cheves' Rep., 50.

The note being payable to bearer, the plaintiff has a legal estate in the note so soon as it passes into his possession.

The question involved in the cases of *Nixon* vs. *English*, 3 McC., 549, and *Perry* vs. *Mays*, 2 Bail., 354, do not apply to this case. If Ramsay was the plaintiff, he might offer the discount, and the Court would sustain it; but the note having been transferred by Ramsay, it was incompetent for the holder to offer it as a discount to the note in question.

*260] **Curia, per* EVANS, J. He who takes a note after it is due, takes it subject to any defence which the maker can set up against the payee; and according to my understanding of the law, where the action is in the name of an endorser, or bearer, to entitle the defendant to set up by way of discount, any matter between him and the payee, he must prove that the note was transferred after due, and that the matter of defence existed between them at the time of the transfer. The defendant has not brought himself within these principles. According to the report, there was evidence that the note was transferred to Cain after it was due, but there was none that Spann was the owner of the note offered in discount, at the time his note was transferred to the plaintiff's testator. Without such proof, we think the presiding judge was right in charging "that the fact of the note sued on being transferred after due, had no other effect than to enable the defendant to avail himself of the want of failure of consideration, or of some equitable defence arising out of the transaction on account of which the note was given." The grounds of appeal imply that the presiding judge charged the jury, that the discount could not be allowed, even if Spann was the owner of it at the time his note was transferred to Cain. It is likely, from the report, that he does entertain that opinion, but it was not involved in the facts of the case, and even if wrong, furnishes no ground for a new trial. It could have

been no more than an incidental expression of an opinion on a question not involved in the case.

I have assumed, in stating the law as applicable to this case,(*a*) that it devolved upon the defendant to prove the facts which entitle him to his defence—the transfer of the note sued on, after it was due, and that at the time of the transfer, he was the owner of Ramsay's note to L. M. Spann. I have always so held on the circuit, and supposed it well settled and understood by the profession, but as doubt has been expressed on the subject, I will endeavor to illustrate it. In the ordinary mode of declaring on a note, nothing appears on the record that the note was not transferred otherwise than in the regular course of trade, before it was due. The plaintiff is bound to prove no more than the making and transfer of the note. It was never heard of, that he was bound to prove when he became the owner of the note. Upon the proof of the making *and transfer of the note, the plaintiff is *prima facie* entitled to recover. His action can only be defeated, by showing some de- [*261 fence on the part of the defendant. By the rules of evidence, he who affirms a proposition, is bound to prove it. Spann, by his discount, affirms that Ramsay owes him, and that he is entitled to set off Ramsay's debt against the plaintiff's demand. To do this, he must make out by proof everything necessary to his defence. A discount is a cross action,(*b*) in which the defendant is the actor, and by him everything must be proved necessary to maintain his cross action. It was not enough to show that Ramsay was indebted to him at the time of the trial, by the production of the note, but he must prove there were mutual debts subsisting between them at the same time; that is, that Ramsay was indebted to him the note offered in discount, at the same time that he owed Ramsay the note which was transferred to Cain. If Spann got the note of Ramsay, after his own note had been transferred, then the debts were not mutual, and cannot be set off, one against the other.

The defendant having failed to make this proof, his discount cannot be allowed, and the motion is dismissed.

O'Neall and Butler, JJ., concurred.

Richardson, J., dissenting.—What is the principle of law upon which the Judge charged the jury? Upon that principle, whatever it was, the verdict is placed, and can stand only if the principle be correct. The Judge states the case as follows: "Assumpsit on a note of hand, of defendant, dated 17th January, 1837, payable to John Ramsay, or bearer, for $325 63, due at one day, and transferred, after due, to plaintiff's testator. The defendant offered, by way of discount, under notice, a note drawn by Ramsay, 19th December, 1838, payable to L. M. Spann, or bearer, due at one day, and transferred to the defendant, 7th January, 1839. The time when the note sued on was transferred by Ramsay to the plaintiff's testator, was not proved. It was still in Ramsay's hands as late as the 25th December, 1838, and six days after the date of his note to L. M. Spann. There was no proof that he retained it, when the latter note was transferred to the defendant; much less was there any proof of an agreement or understanding between

(*a*) See 11 Rich., 381, *Jewry* vs. *Strauss*. *An.*
(*b*) Sup. 29. *An.*

262] Ramsay and the defendant, that the notes should be discounted, the one against the other. Without such proof, and without knowledge on the part of plaintiff's testator, when he obtained the note from Ramsay, that there existed any counter claim by way of discount, I held, that the fact of the note sued on, being transferred after due, had no other effect than to enable the defendant to avail himself of the want or failure of consideration, or of some equitable defence arising out of the transaction on account of which the note was given, and did not enable the defendant to set up, by way of discount, any other separate and independent demand which he might have or acquire against the payee.

"The plaintiff offered in evidence, a letter of 31st January, 1840, from the defendant to the plaintiff herself, or her testator, asking forbearance, and promising to pay."

It is plain that the case presented this question of law: Was it necessary for Spann to prove that, at the date of his discount, (7th January, 1839,) Ramsay still retained his note? or was the time when Ramsay transferred that note to Cain, a question for the jury, under attending circumstances? I maintain that the jury alone should have decided the fact from the circumstances.

But the charge to the jury presupposes that no defence can be set up, but such as was intrinsic to the note, or would arise out of the equity of that single transaction; unless by agreement with or notice to the endorsee, or unless it be proved that Ramsay still held Spann's note, at the time Spann took the transfer of Ramsay's note. This would exclude, of course, all discount, and balancing of accounts, however just, between the maker, (Spann the payee, and J. Ramsay,) as extrinsic to the matter of the note, unless Spann proved expressly, that his note was in the hands of Ramsay on the 7th of January, 1839.

But, is this the proper principle? The purport of the endorsement of a note already due, is that of an order to pay the money to the endorsee; which order, the maker has, by virtue of his note, already accepted. But only to the extent of his true indebtedness at the time of the endorsement. It amounts to the acceptance of a bill, if so much be due the drawer: and the note is to be settled by the adjustment of their mutual accounts, to be made with the endorsee, instead of the payee. Where a negotiable *263] note is endorsed by the payee, *before due, the maker is confined to the written terms of his note. Whatever be his counter demand upon the payee, the note has become his bill of credit, for so much money, which he must pay to the endorsee, without abatement.

But, whenever the note has been endorsed after due, the endorsee receives it upon the faith and credit of the endorser alone, and the maker may set up any defence that he could have done against the payee at the time of transfer. *Williams & Co.* vs. *Hare*, (2 Hill, 483;) 3 Term, 82; 7 T. 429; Chitty, 143; 3 Kent, 91; 3 McC. 549; 2 Bail. 354. The true inquiry, then, in the case, should have been, whether the discount of the defendant would have been good and available against John Ramsay at the time of the transfer. Suppose, for example, the endorsee, upon receiving the note from John Ramsay, and ignorant of any discount, and, as the fact was, without any notice or agreement, had called on the maker (Spann) for payment; and Spann had presented Ramsay's

note, or the note and the balance in money, would not Spann's note have been paid in full? or *pro tanto* according to his tender? And, for the purposes of the charge to the jury, this was substantially the case before the Court. For the jury were to decide, whether Spann received Ramsay's note in *due time*, to render it available against the endorsee, and could have so presented it. This should have been the question. And Spann's subsequent letter of 31st January, 1840, may, very possibly, have indicated the fact against him. But that remains to be tried by the jury.

If this be not the true question, then any bank may sue A, upon his note, endorsed by another bank, after due, and A cannot bring in discount the bills of the endorsing bank, to meet his own note; and, if so, any broken bank has only to let its discounted notes become due, endorse them over for value at a time unspecified, and the makers cannot discount the bills of such bank, collected for the purpose of paying these very notes, unless the makers can also prove the precise time when their own notes had been endorsed. In the case before us, if Cain truly held Spann's note before the 7th of January, he could have proved the fact, by showing that he had the note in possession. But Spann could only disprove it by circumstances adduced, and leave the presumption to the jury. In such case, the notes should, or at least, may, discount each *other, just as if Spann's note remained in the hands of Ramsay, unless it appear that his note had been transferred to Cain before [*264 the 7th of January. If it be not so, then Cain took the dishonored note upon the credit, not of the endorser, but the maker, which reverses the law of the case, (see 3 Term, 82,) and would throw the burden of express proof upon the defendant, who had only undertaken to pay what he owed Ramsay at the time of the transfer to Cain. It is unnecessary to go so far as to say, that after Spann proved that Ramsay held the note as late as the 25th December, 1838, at least, the burden of proving that Cain received it before the 7th January, fell upon the plaintiff. But I do conceive it was the very point of the case, and for the jury to decide, under the facts, before the Court; and that, therefore, there ought to be a new trial, for error in the charge, in supposing that the burden lay altogether upon the defendant.

GANNT, J., concurred.

J. A. HARPER *vs.* J. W. SCUDDY.

There is nothing in the attachment law, which precludes a defendant from availing himself, (on a motion,) of any defect or irregularity in the process of attachment.

Before EVANS, J., at Abbeville, Spring Term, 1841.

This was a domestic attachment, issued by a magistrate, and directed to the *Sheriff of Abbeville* district. It was made returnable on the 2d Monday in March. The Court sits on the 3d Monday. A motion was made to set it aside, on the ground that it should have been directed to

*265] all and singular the *sheriffs of the State, and was not returnable to any term of the Court. The motion was granted; and the plaintiff appeals:

1. Because his Honor erred in holding that the defendant in attachment, by motion to the Court, without appearance, by special bail, to the action, may take advantage of a mere irregularity in the proceedings.

2. Because his Honor held that the defendant being required to appear the second instead of the third Monday in March, was a defect which rendered the proceedings void, and showed that the Court had no jurisdiction.

Wilson, for the motion, cited Acts 1839, (*a*) and contended that there was no defect in the process. Act 89; 2 Brev. 168. It would be good at the next term after the return.

Irregularity or error in an attachment, cannot be taken advantage of by motion. It must be by special plea and appearance. Harp. Rep. 368, *Acock* vs. *Linn & Landsdown*; 3 Chitty's Genl. Practice, 74; Cheves' Rep. 5, 6.

The defendant is no party so long as the attachment is confined to his goods.

Burt, contra.

Curia, per EVANS, J. In this case a domestic attachment was set aside on the ground that it was made returnable to the next Court of Common Pleas, to be holden at Abbeville court-house on the second Monday in March. By law, the Court of Abbeville sits on the third Monday. There can be no doubt that, in ordinary cases, this objection is fatal, and that the service would be set aside on motion. But it is supposed because this is an attachment, a different rule is to prevail. The grounds of appeal assume that the defendant cannot be heard in Court, until he appears and dissolves the attachment by giving special bail. If this proposition be true, then he who is made a party in Court, by attaching his property, is shut out from any of those exceptions of which *advantage can only* be taken by motion, for when he appears, his mouth is closed as to any *irregularity* in the process, be it ever so great.

*266] *There is nothing in the attachment laws which admits of any such construction. The attachment issues, because process cannot be served personally, or by leaving a copy, and by attaching his goods instead of his person, the defendant is made a party in Court; but I do not find anything in the attachment Acts which takes from him the privilege of other defendants, except that he cannot have his property restored, or dissolve the attachment, otherwise than by appearance and special bail. In the construction of these Acts, our Courts have gone no further than to say, they will not hear such objections from the garnishees or strangers. To this effect the case of *Foster* vs. *Jones*, (1 McC. 116,) *Cumberford* vs. *Hall*, (1 McC. 345,) *McBryde* vs. *Floyd*, (2 Bailey, 209,) *Chambers* vs. *McKee*, (1 Hill, 229.)

In none of these, is the right of the defendant to except to the *irregularity* denied, and in some of them it is expressly recognized.

The motion to reverse the decision of the Circuit Court is refused.

The whole Court concurred.

See *infra*, 460; 4 Strob. 290; 4 Rich. 561; 5 Rich. 64, 478, as to *Monday;* 2 McM. 339. *An.*

(*a*) 11 Stat. 18, § 18; 7 Stat. 254, §§ 3, 4. *An.*

*ANDREW MITCHELL & CO. *vs.* MCBEE & IRVIN. [*267

Where the vendor sends goods, with his price marked upon them, and they are accepted by the vendee, the law will imply that they were taken on the vendor's terms; unless it should appear otherwise, from the course of previous dealing between the same parties, or from some custom with which both were acquainted.

Before GANTT, J., at Greenville, Spring Term, 1841.

A suggestion of fraud to a return made by a garnishee, in a case of attachment. The following statement of facts appears from the report of the Circuit Judge.

McBee & Irvin, co-partners in trade, as merchants, sent an order for goods to a merchant in New York, by the name of Purdy. Certain goods were sent on by Purdy. Shortly after the arrival of the goods, the house of Andrew Mitchell & Co., merchants of New York, sued out an attachment against Purdy, a copy of which was served on the firm of McBee & Irvin. McBee & Irvin, soon after the arrival of the goods, addressed a letter to Purdy, stating that some of the goods forwarded were such as were not embraced in their order to him, and such as were contained in their order were charged at too high a rate. Purdy, on the receipt of the letter, wrote to Mr. Nicol, a correct and regular bred merchant of the village of Greenville, requesting him to call on McBee & Irvin, and effect a settlement with them, which Mr. Nicol stated could have been made but for the attachment which had been served.

In Purdy's letter to Nicol, he did not say that the goods ordered had not been charged too high, nor did he deny that in the invoice of goods sent, articles were inserted which had not been ordered. On these subjects he was silent. The authority given to Nicol, by Purdy, to effect a settlement with McBee & Irvin, and to take less than what the goods were charged at, carried with it a tacit admission that the complaints of McBee & Irvin were well founded.

Irvin, the garnishee, made his return to the attachment served on the house of which he was a member; to this return there was a suggestion of fraud, and an issue made up.

*Application was made, in open court, before the trial was proceeded in, to amend the return, by the insertion of two small articles which had been overlooked and omitted to be inserted by mistake. I thought the application most reasonable, and did not hesitate to allow the amendment to be made, although strenuously opposed by the counsel for the plaintiffs in attachment. [*268

A bill of particulars had been made out by the house of McBee & Irvin, which was submitted to the inspection of merchants, and who deemed the charges therein such as were correct and proper. The general scope of the evidence went to show the truth of the fact that many of the articles had been too highly charged for.

I saw nothing in the evidence that would justify the conclusion that the return of the garnishee was fraudulent, or otherwise than what the principles of justice and law recognized. My charge to the jury corresponded with this view of the case, and the jury made a deduction, which appeared to me to be rational and proper, and well supported by the testimoney.

The grounds of appeal consist, 1st In the Court having granted leave to amend the return of the garnishees. The law would be converted into an engine of oppression, if such an application, founded on principles of honesty and correctness, could not be received and acted on.

On the first ground for a new trial, I did not think that McBee & Irvin were bound by force of the attachment, to submit to the gross imposition attempted to be practiced upon them, either by Purdy or certain plaintiffs in attachment. On the second ground, I have only to observe that the objection grows out of testimony which was introduced by the counsel for the plaintiffs in attachment, (the evidence of Nicol,) and was clearly proper for the consideration of the jury. The attachment which had been levied neither destroyed the competency or credibility of Purdy as a witness.

His Honor will take notice that we will, at the next Court of Appeals, move to reverse his order, granting leave to amend, without paying costs, after issue joined; and for a new trial, on the following grounds:

*269] *1. Because his Honor charged the jury that although the defendants did receive and appropriate the goods to their use, with a full knowledge of the prices charged for them, they were not bound to pay those prices, but might take them at the valuation of the witnesses.

2. Because his Honor permitted the declarations of H. Purdy, the absent debtor, made after the execution of the writ of attachment, to go to the jury; and because he told the jury, the affidavit of the respectable firm of McBee & Irvin, was sufficient to satisfy them the return was not false, and to find their return false, would be equal to finding them guilty of perjury.

3. Because the verdict is contrary to law and evidence.

Choice, for motion, cited, 2 Starkie Ev. 878, note; *Id.* 877; 4 Esp. Rep. 95, letter C.; 1 Stark. 257.

A contract cannot be rescinded in part. Chitty on Cont. 275–76; Saunders on Pleading, 544; 2 Bail. 4, *Robison* vs. *Jones*.

B. F. Perry, contra, cited 1 Rice's Dig. 80. A garnishee may amend his return.

Curia per BUTLER, J. In addition to the facts stated in the report, it was admitted in the argument of this case, that defendants were opening the goods when the attachment was served on them. Of course, they then had it in their power to refuse to take such goods as were not ordered, and others charged at higher prices than they were willing to give. Instead of doing this, and giving notice to Purdy of their objection and refusal to accept the good, they received and appropriated them. Some days afterwards, but when the rights of the parties were fixed under the contract, they wrote to Purdy, intimating their dissatisfaction. By their conduct they made themselves parties to a contest which they might have left with the plaintiffs and Purdy, and have rendered themselves accountable for the value of the goods, under the terms of the contract between themselves and Purdy. They have voluntarily assumed a position which they could well have avoided, for they could have restricted their liability to pay only for the goods which they *270] had ordered, and which they *were willing to receive at the prices specified, leaving the others in the hands of the sheriff, to be disposed of under the order and judgment of the Court. Having accepted all the goods, the defendants have given to the plaintiffs the power to insist upon and enforce Purdy's rights, whatever they were at the time

the goods were received; and it was not in Purdy's power to defeat these rights, by any arrangement, which he might chose to enter into with a view to prejudice the plaintiffs. By the voluntary act of the defendants, the plaintiffs are placed in a situation in which they can insist on their absent debtor's strict legal rights. The question is, what are these rights, by the legal operation of the contract under which the goods were received? The vendor sent them on with their prices specified in the invoice that accompanied them. One party says, in effect, I send you these goods, at the prices mentioned; and if you take them, you know what you have to pay. The other party, the vendee, says, no, although I did not order these particular goods, I will take them, but I will not pay your prices, I will have the goods subject to another valuation, against your consent, and will pay you in Greenville, as much as they are estimated to be worth. The one insists on his own prices, perhaps according to valuation in New York, and the other on a *quantum valebat*, to be determined at Greenville, the place of consignment. In an action for goods sold and delivered, where no price was agreed on by the contracting parties, or where the vendor has not put a specific price on them when he sends them to the vendee, the vendor must recover, and *quantum valebat* to be ascertained by evidence on the trial.

But when the price has been agreed on, or where the vendor sends goods with his prices marked upon them, and they are accepted by the vendee, the law will imply that they were taken on the vendor's terms, unless it should appear from the course of previous dealing between the same parties, or from some custom with which both were acquainted, that the defendants had a right to reduce the prices to a *quantum valebat*, at the place where they were received. For in such case the contract might be supposed to have been made in reference to the custom or course of dealing. In the absence of these, the general principles of the law must prevail. It seems to me, that no one should be obliged to part with his property against *his consent, except on his own terms; and if the defendants in this case can take these goods and put [*271 their own prices on them, or by the estimate of their own witnesses, can reduce the prices, the vendor might be compelled to part with his property at prices lower than he was willing to take, and below their true valuation. It is enough to say that the vendor could not compel the vendees to take the goods against their consent, upon his own terms, and it is reasonable that he should not be deprived of them against his consent, upon the terms of the defendants. The case stands thus between the parties: The defendants sent to Purdy for certain goods of a particular description, he sends others not ordered or contracted for, and at higher prices than were implied in the contract, and the defendants receive and appropriate them. Now, what should be law on the subject? I have examined the cases referred to by Mr. Starkie, in his 2d vol. on Ev. p. 640, and I think he has extracted and laid down the principle correctly. "Where there has been a special contract as to the nature, quality and price of goods, and those which have been delivered do not correspond with the contract, it is clear the vendee has a right to repudiate goods so delivered in *toto*; for having contracted for one thing the vendor cannot substitute a contract for some thing else; and therefore, if he return the goods, or give notice to the vendor to take them back, it

is clear the vendor cannot recover," &c. If, however, the vendee in such cases choose to keep the goods, he cannot reduce the special contract to a mere *quantum valebat*, &c., he must pay the price or return the goods. The question of amendment was within the discretion of the Judge below.

In this view of the law, we think a new trial should be granted in this case, which is accordingly ordered.

O'NEALL and EVANS, JJ., concurred.

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*272] *BAKER, JOHNSON & CO. *vs.* ABNER BUSHNELL.(*a*)

Where an applicant for the insolvent debtors' Act has been discharged by order of the Circuit Court, and the order for his discharge has been set aside by the Appeal Court, the rights that he acquired by the order, ceased and determined when it was reversed by the Appeal Court.

A defendant who is a party to an appeal, is bound to take notice of the result of the appeal; and where a defendant, pending an appeal, has left the "prison rules," so soon as the appeal is decided against him, he should return within the rules; otherwise his bond is forfeited.

Before EVANS, J., at Edgefield, Spring Term, 1841.

This was an application for discharge, under the insolvent debtors' Act of 1758. It appears that the application was made at the preceding term, and the plaintiff had filed a suggestion, alleging certain objections to the discharge. The presiding judge had ordered the discharge, and the schedule was accordingly assigned, and the oath administered. For some cause, this order was reversed by the Appeal Court,(*b*) but in the mean time, the defendant, who had given security to remain within the prison rules, had gone without them, and did not return again until within a few days before this application was made at this term. It did not appear that any notice had been given him of a reversal of the former order made for his discharge.

On the first or second day of the term, an application was made to me, for leave to amend the suggestion, by adding new objections to his discharge. This I refused, as likely to operate a delay prejudicial to the defendant. During the term, the issues on the suggestion were tried by the jury, and all of them found for the defendant, when his discharge was moved for. The plaintiffs objected, that since the last Court the defendant had gone without the prison rules; the objection was overruled, and the prisoner discharged.

GROUNDS OF APPEAL.

Because the defendant, Bushnell, having gone without the prison rules, since the suggestion was filed, and since the October term of the Court, this objection to his discharge could not have been made when the suggestion was filed, and could be made only by an amendment of the suggestion; and be-
*273] *cause his Honor held that he was entitled to his discharge notwithstanding such absence.

(*a*) S. C. Sup. 66. *An.* (*b*) Sup. 66. *An.*

Burt, for motion, said, the Court had power to permit an amendment. If so, could the Court then exercise a discretion? Cited Act of 1759; Act of 1788. (*a*)

Was the defendant, by his being without the prison rules, prevented from his discharge, and did he come within the contemplation of the Act of 1788. 6th Statutes at Large, 491. *Briggs* vs. *Walker*, 1 Hill, 118; 3d Chitty's Gen. Prac. 553.

Pending an appeal, shall the defendant remain within the rules?

Pending an appeal, the proceedings are not complete on the circuit, and it is the Appeal Court that confirms or vacates the proceedings of the Circuit Court. Hence the prisoner is compelled by law to remain within the prison rules.

If the prisoner was bound to return within the prison rules, after the refusal of his discharge by the Appeal Court, should he have notice of such refusal?

Was it necessary that notice of the appeal should be given before the order for the defendant's discharge was made?

The defendant was bound to remain within the rules until the time of appeal had elapsed.

Carroll, contra, cited 2 Bay's Rep.; 3 Chitty's Gen. P. 563.

Wardlaw, contra. Does the law require that any one applying for his discharge, be imprisoned, to entitle him to his discharge? 2 Brev. Dig. 155; *Id.* 160.

There is no necessity by law for the defendant to be imprisoned at all.

Curia, per EVANS, J. The fact was clearly established, that immediately after the order was made for his discharge, at Fall Term, 1840, the defendant went beyond the prison bounds, and remained without them, until at or about the beginning of the next term.

And the only question which I propose to discuss is, whether by this act he forfeited his right to be discharged, under the insolvent Act of 1759. By the Act of 1788, sec. 7, it is enacted* "that no prisoner shall be discharged, if he or she has been seen without [*274 the prison rules, without being legally authorized to do so." The defendant did go and remain without, and unless he has shown that he had legal authority to do so, this question must be decided against him. The general rule is, that any order or judgment of a Court, having jurisdiction of the subject matter, is binding and conclusive, until reversed; and I think the defendant was not bound to go back to prison, there to wait until the plaintiff had decided whether he would appeal. The order conferred on him the privilege to go at large, and this privilege he might lawfully exercise so long as the order was a subsisting one; during that time it was a shield and protection to him. But when the order was reversed, as to future events, it was as if it had never existed, and all the rights acquired under it, from that time, ceased and determined.

The defendant being a party to the appeal, was bound to take notice of the result of it. When the order was revoked, he no longer had any legal authority to be without the jail bounds. He should have returned, but he did not; and it is the opinion of this Court, that he thereby forfeited his right to be discharged under the insolvent law. The motion to reverse the decision of the Circuit Court is therefore granted.

RICHARDSON, O'NEALL and BUTLER, JJ., concurred.

See 5 Rich. 294; Dud. 370. *An.*

(*a*) 4 Stat. 56; 5 Stat. 78. *An.*

*275] *DANIEL CALDWELL, et al. *ads.* JAMES LANGFORD.

To correct a slave with a whip, giving him but fifteen stripes, when he is found without his master's enclosure, with a ticket or permit, accounting for his absence, is held to be a beating and abusing, within the meaning of the Act of 1839.

In bringing an action in the *sum. pro.* jurisdiction, to recover the penalty of $50, under the Act of 1839, (*a*) for the unlawful beating of a slave, it is not necessary that the plaintiff should aver in his process that the defendant was a white man.

Strictness of pleading is not required in the summary process jurisdiction.

Before EVANS, J., at Newberry, Spring Term, 1841.

These were *sum. pro's.* to recover the penalty of fifty dollars, under an Act of the Legislature, subjecting to that penalty, any one who shall beat and abuse any slave having a ticket.

The facts that the defendants severally beat the plaintiff's negroes, with tickets, were clearly proven. The beating consisted in the infliction of about fifteen stripes with a whip.

The negroes were at a store, on Sunday, behaving themselves peaceably and orderly; and the flogging was without any excuse, and done in mere wantonness of power.

One of the grounds of appeal alleges that the tickets were not lawful tickets. I do not remember the words of the tickets. They were not in the very words of the Act, but in substance the same as the words prescribed.

The defendants claimed to have their case tried by a jury, who decided for the plaintiffs.

I refused a motion for a nonsuit, on the grounds set out in the brief.

In my charge to the jury, I told them that the law had not affixed to the words "beat and abuse," any precise meaning, and it was for them to decide whether the facts as proved was a beating and abusing within the Act. In my own opinion, and I think it likely I so stated to the jury, any wanton whipping of a negro, without any pretence of excuse or justification, constituted the offence for which the action would lie.

Defendants moved for a new trial, in arrest of judgment, and for a nonsuit.

*276] **In arrest of judgment*, upon the grounds:

1. That it is not alleged in the processes, that the defendants were white men.

2. That it is not alleged in the processes, that the negroes who were whipped, were peaceable and quiet.

For a nonsuit, upon the grounds:

1. That the infliction of fourteen or fifteen lashes, with a switch, did not constitute a beating or abusing of the slaves, according to the meaning of the Act of the Legislature upon the subject.

2. That the tickets which the slaves had, were not lawful tickets.

And for a new trial, upon the ground:

That his Honor charged the jury that, in his opinion, any whipping of the

(*a*) 11 Stat. 58, § 5.

slave of another, would be sufficient to entitle the owner to recover the penalty of fifty dollars, under the Acts of Assembly; whereas it is respectfully submitted, that a moderate whipping of fourteen or fifteen lashes, such as were inflicted by the defendants, does not constitute the offence of beating or abusing a slave; and that although his Honor did intimate to the jury that they might come to the conclusion that the defendants were not guilty of beating or abusing the slaves, yet the distinct expression of his own opinion very properly governed the jury in making up their verdict.

Pope and *Pope*, for the motion, cited Acts 1839, 58 and 59, 5 sect.

This action is brought for a penalty, and not for liquidated damages.

Under the ground in arrest of judgment, it was contended by Mr. P. that the defendants should be described in the process as white men; and the negroes should be alleged to be peaceable. Cited Rice's Dig. 15: 2 Brev. Rep. 386, *The State* vs. *Clarke*.

Fair, contra, cited 8 Stat. at Large, 538, and said the *status* of color was a question for the Court.

Curia, per O'NEALL, J. I agree fully with the Judge below, that any unlawful whipping of a slave, is a beating and abusing *within [*277 the words of the Act of 1839, sec. 5,(*a*) (A. A., 1839, 58,) which enacts, "that it shall be the duty of the commander of every patrol, at least as often as once a fortnight, to call out the patrol under his command, and to take up all slaves who may be found without the limits of their owner's plantation, under suspicious circumstances, or at a suspicious distance therefrom, and to correct all such slaves by a moderate whipping with a switch or cowskin, not exceeding twenty lashes, unless the said slave have a ticket or letter to show the reasonableness of his or her absence, or shall have some white person in company to give an account of the business of such slave or slaves; and if any white man shall beat or abuse any slave quietly and peaceably being in his master's plantation, or found any where without the same, with a lawful ticket, he shall forfeit the sum of fifty dollars."

The first question made by the defendants is, whether in the processes, it was necessary to aver that the defendant, being a *white man*, did, &c. This point was decided in the exactly analogous case, *The State* vs. *Schroder*, (3 Hill, 60.) In that case, the defendant was indicted for selling spirituous liquors to a slave, under the Act of '34, which provides, "if any free white person, being a distiller, vendor, or retailer of spirituous liquors," &c. In that case, it was held that it was unnecessary to charge that the defendant was a "free white person." It was said there, as it may be here, of the words used in the Act, "they are merely descriptive of the person by whom the offence may be committed; and unless there is some uncertainty without the words, whether the defendant be liable to receive judgment on conviction, there can be no necessity to use them.' The general inference is, that a party in Court is white, until the contrary appear; and until a defendant claims the unenviable distinction of being regarded as colored, he will be regarded as occupying the position of a free white man.

The second ground objects that it is not alleged in the process, that the slave was found "peaceably and quietly without his master's plantation." These words, according to my construction, apply exclusively to

(*a*) 11 Stat. 58, § 5. *An.*

the case of a slave found on his master's plantation, and it may be, in that case, it is necessary that they should be used. But in the process
*278] jurisdiction, *strictness of pleading is not required. If the party in a short way state his claim to demand money, as a debt, or as a compensation for an injury, and enough appears to apprise the party of the matter to which he is called to answer, it is generally sufficient. Technical precision is not demanded, *Hilburn* vs. *Paysinger*, (1 Bail. 97.) I should, therefore, be inclined to think, that in a process of this character, a description of the injury sufficiently definite to apprise the party of the matter of which the plaintiff complains, would be sufficient. The processes here are sufficient, according to the strictest rule of defining an offence in the words of the statute, if it were not necessary to aver that the slave was found "peaceably and quietly," without, &c. The portion of the clause under which this action is brought, should read thus: "If any white man shall beat or abuse any slave found without his master's plantation, with a lawful ticket, he shall forfeit the sum of fifty dollars." That this is the true reading is, I think manifest, from reading the two parts of the sentence together. What is it which agrees with the participle, being, in the preceding section? It is the word slave, and the conjunction unites the sentence, so that the word slave agrees in the succeeding section of the same sentence, with the participle found; but the adverbs, quietly and peaceably, qualify the word being, and might have the same effect on the word "found," if a new qualification with a lawful ticket was not added. But without pursuing this philological examination of the sentence, it will be only necessary to read the previous parts of the section of the Act, to see that the Act does not authorize even a patrol to whip a slave found out of his master's plantation, if he shall have a ticket or letter showing the reasonableness of his absence. Reading the two parts together, I think it is plain that the penalty was intended to be incurred, if a slave was whipped contrary to the provisions authorizing it. Turn to the 13th sec. Act of 1839, p. 60, and the same authority is repeated. I am free to admit that if the slave had not in fact demeaned himself "quietly and peaceably," the defendants might have justified their conduct, and would have been protected, under the general authority which devolves on all white men, of correcting slaves who may so offend.

If, however, the words "quietly and peaceably," do qualify the word
*279] found, and are to be read as part of the sentence *under which these processes are brought, still I do not think it was necessary to aver that the slave was found quietly and peaceably without, &c. For in that case, it would be matter of excuse to the defendants, and as such need not be noticed. In 1 Chitty's Crim. Law, 283, it is said, that in an indictment for not going to church, it is not necessary to aver that the defendant had no reasonable excuse for his absence, on account of the words of the Act, "having no reasonable excuse to be absent," for as the necessity for proving the excuse lies upon the defendant, the contrary need not be averred by the prosecutor. That this is the rule applicable to these cases is, I think manifest, when we recur to the Act, and find that this penalty is given in addition to the defendant's liability for the trespass for beating a slave. If a slave is beat, it is a trespass, until it is justified or excused by the party beating. It is only necessary

to state the fact to create the legal implication of trespass, and all matters of excuse or justification must come from the defendant. The object of the Act was to punish by a penalty a trespass committed on a slave, with his master's ticket in his hand, unless the defendant could justify or excuse his act, by showing that the slave so misbehaved himself as to authorize any white man to correct him.

The other grounds were not pressed in argument, and need not be noticed.

The motion is dismissed.

GANTT, EVANS and BUTLER, JJ., concurred.

See *Hadden* vs. *Liebeschultz*, 11 Rich. 505; *Smith* vs. *Hamilton*, 10 Rich. 48. *An.*

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*J. J. RICHARDSON *vs.* T. C. RICHARDSON. [*280

The parol undertaking of a third person to pay for articles purchased by another, is void, by the *Statute of Frauds.*

Before EARLE, J., at Sumter, Spring Term, 1841.

This was a *sum. pro.* on a merchant's account. The goods were charged on the books to one Simmons, who was the overseer of the defendant. It was attempted to make the defendant liable on the evidence of Jones, who was the clerk of the plaintiff, examined by commission, who deposed that he was under a strong impression that the goods were charged to Simmons at the request and direction of the defendant. That Simmons was not held responsible, and in fact had never been called on to pay. That the defendant, when called on, referred witness to Simmons, saying, if it was correct, he defendant, would pay it; and Simmons said it was correct, deducting a single charge of four dollars; and, in fact the plaintiff always looked to the defendant.

The question arose on a motion for nonsuit, whether the defendant was liable. I thought the books established a debt against Simmons, and that the credit was originally given to him. The strong impression of the witness was not enough, in my judgment, to obviate the effect of this. The parol undertaking of the defendant, was collateral and void. The nonsuit was ordered.

The plaintiff moves to set aside the nonsuit.

1. Because the undertaking on the part of the defendant to be responsible for articles purchased by Simmons, was original in its nature, and not within the statute of frauds.

2. Because the credit was wholly given to the defendant, the account having been only charged to Simmons, at the special instance and request of the defendant, for his convenience, and credit was expressly refused to Simmons himself.

W. F. De Saussure, for the motion. The question in this case is, to whom was the credit given? Looking to the testimony, we must conclude that it was given to the defendant. *McKenzie* vs. *Quilter*, (4 McC. 409.)

**Moses*, contra. If a third person is liable, it must be in writing. 1 Saunders, 211, note A. *Lelland* vs. *Crain*, (1 McC. 100.) [*281

Curia, per GANTT, J. This was a summary process on a merchant's account. On the books it appeared that the goods were charged to one Simmons, the overseer of the defendant. It was attempted to be shown on the trial, that although the goods were charged to Simmons, yet that the defendant, Thomas C. Richardson, was the original contracting party, and, as such, bound in law to pay for them. The evidence offered to show this, was the examination of the clerk of the plaintiff, who deposed that he was under a strong impression that the goods were charged to Simmons at the request and direction of the defendant.

But the process which issued in this case, is conclusive to show that Simmons, and not the defendant, was the original contracting party; for it alleges that the defendant is indebted to the plaintiff in the sum of twenty-seven dollars and seventy-one cents, which he assumed to pay on an account for that sum, which the plaintiff had against one Thomas Simmons. How, then, can it be maintained, that the undertaking was original on the part of the defendant? If the defendant ever did promise to pay this account for Simmons, the promise should have been in writing; otherwise, it cannot be enforced, being void by the statute of frauds.

The motion is refused.

The whole Court concurred.

See 2 McM. 372, and note there. *An.*

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*282] CHARLES FOWLER *vs.* SAMUEL FLEMING.

Where there is a special endorsement on a note, waiving the right to the usual notice of demand and refusal; unless the endorsement is written by the endorser, its truth and correctness must be clearly proved to have come from his authority, or it cannot avail the endorsee.

Before GANTT, J., at Laurens, Spring Term, 1841.

This was an action of assumpsit on two notes of hand; one for seven hundred and fifteen dollars, on which there was no defence set up, the other for four hundred dollars, drawn by Thomas B. Lockhart, in favor of Samuel Fleming, the defendant, and endorsed by him in blank before due. The blank was filled up by Fowler, so as to dispense with the otherwise legal necessity of making a demand on the drawer, and giving notice to the endorser, of non-payment. The verdict of the jury was in favor of the plaintiff, to the amount of both notes, and the defendant appeals, on the following grounds:

1. Because the parol testimony was incompetent to alter or explain the endorsement in blank.
2. Because the proof made in said case was insufficient in law to sustain the action.

The evidence offered in this case, was the examination of M. B. Park, the purport of which was, that he heard Fleming say that he authorized Fowler to fill out the endorsement; that he, (Fleming,) did not know

that the law required demand and notice; but that when he endorsed the note, he considered himself as much bound for its payment, as if he had been security.

The next evidence that was offered, was that of Robert H. Park, who testified that he heard Fleming say, that when he put his name on the back of the note he allowed Fowler to fill up the endorsement as he wished. Other testimony was offered, but it is omitted, as having no direct bearing on the isolated question of the law by which this case must be determined.

As respects the note of Lockhart, endorsed by Fleming to the plaintiff, I saw nothing so conclusive in the testimony as *to justify the jury in concluding that there had been any waiver on the part of [*283 Fleming of the legal necessity of making a demand on the drawer, by the endorsee, and in the event of non-payment, of giving notice of the same to the endorser.

Whether Fowler was authorized to fill up the blank so as to dispense with the necessity on his part of making a demand of the drawer when the note became due, and on failure of payment, of giving notice to the endorser thereof, was a question to be settled by the evidence. I saw nothing in the testimony to justify such a deduction, and in the charge made to the jury insinuated as much; but the jury thought otherwise, as would appear by their verdict, finding for the plaintiff the amount of the endorsed note.

Sullivan, for the motion, cited, on the first ground, 3 Kent's Com. 88; 1 Moore, 535, or 1 Harr. Dig. 504, *Campbell* vs. *Hogson;* 1 Harr. Dig. 519, or Gow. 79; 3 Campbell, 57; 1 Starkie Rep. 361; 10 Barn. & Cress. 729; 5 John. 375; Chitty on Bills, 192; 2 Mills' Const. Rep. 31, *Price, Ex'or*, vs. *Perry;* 29 Charles; Genett Mercantile Law, 176–7.

Young, contra, insisted that the plaintiff could not recover on the endorsement. That he could upon the general counts in the declaration for money borrowed. Cited *Beckwith* vs. *Angel*, 6 Connect. Rep. 345; *Ulen* vs. *Kithredge;* 7 Mass. Rep. 233; *Joslin* vs. *Ames*, 3 do. 235; 13 Johns. 178; 17 do. 329; 14 do. 349; *Frampton* vs. *Dudley*, 1 Nott & McCord, 128. A party may prove by parol any agreement that was entered into at the time of the endorsement. Also, what power was delegated. The verdict should stand upon the general count in the declaration.

Sullivan, in reply, said the case from 1 N. & McC. 128, relied on by plaintiff's counsel, did not support the position of plaintiff.

Curia, per RICHARDSON, J. The Court concurs with the presiding Judge in the principles of his charge to the jury. The endorser of a promissory note undertakes to pay the amount, if the maker shall not have paid it, after demand made on the day fixed for payment, or by the last day of *grace, and provided due notice of his failure so to pay be given to the endorser. (N. &. McCord, 83; 2 N. & McC. [*284 283.) But it is clear that the endorser may waive his right to such timely demand and notice; but when such a waiver of the endorser's legal rights is alleged, it should be plainly proved; and, assuredly, any endorser may expressly endorse his consent to waive such rights, and dispense with further proof. As to the competency of any other person to fill up such special endorsement, by the authority of the endorsor, I can perceive no reason to question it, (3 Kent, 90; 6 Con. Rep. 340; 4 Pick. 386; 13

John. 179; 17 Johns. 329.) And I know of no principle of law to prevent such authority being by parol or verbal direction. Blank endorsements are in general filled up by the endorsees, and such special endorsement is no more than an express waiving of the right to require due demand, and the notice of a failure to pay the note, which are facts usually proved *viva voce*. But whatever be the special endorsement, unless written by the endorser, its truth and correctness must be proved to have come from his authority, or it cannot avail the endorsee. It would be still a question upon the actual agreement or undertaking of the endorser, to be made out by evidence "*aliunde*."

To make out such an undertaking was in fact the very object in the case before the Court, in order to hold the endorser liable upon the alleged special endorsement supposed to have been authorized by Fleming.

The true question of the case, therefore, turns upon the inquiry: did Fleming authorize the special endorsement found upon Lockhart's note? The allegation that Fleming authorized such an endorsement, varying from, if not contradicting the usual purport of endorsements, and rendering him liable, when he would not have been liable, upon the usual blank endorsement, ought to be clearly made out. But the Court can perceive, in the evidence offered, no sufficient proof of any agreement to deprive Fleming of the established rights of an endorser. He may have well authorized the endorsee to fill out the endorsement, or considered himself as the security for the note, without agreeing to renounce the rights of an endorser who is a provisional security, (See *Miller & Co.* vs. *Thompson*, MS. cited 1 Rice's Dig. 129.)

*285] *Any one may renounce his legal rights. But it should appear that he understood what he released, or else did so expressly. (1 Bailey, 453.) As, for instance, where the endorser promises payment, knowing there has been no demand upon the maker, and that he might have objected on that account. *Atwood* vs. *Haseldon*, (2 Bailey, 457.) *Miller & Co.* vs. *Thompson*, (1 Rice's Dig. 129.)

In such a case, the subject of the release is of a legal advantage; which may be done. But, in the case before the Court, there is scarcely any proof of such an intention. The evidence would rather go to excuse the endorsee for so filling up the endorsement, than to prove that he had express authority for doing it; and no support can be derived from his own act, or manner of endorsing the note. For, as against Fleming, we are to look not so much to the endorsement itself, as for the proof of his authority to Fowler to make such special endorsement; and if we suppose the endorsement again in blank, we readily perceive how feeble is the evidence that Fleming ever intended to renounce his right to require a demand and notice of refusal to pay the note. There must, therefore, be a new trial, unless the plaintiff shall release the verdict to the extent of the note of $400 and interest.

The whole Court concurred.

See Sup. 76; 3 Rich. 133; 4 Strob. 10. *An.*

*CLARKE, McTIER & Co. *vs.* JAMES SIMPSON. [*286

A plaintiff, after the defendant has been arrested by virtue of an order for bail, has the right to discharge the bail from any liability; and also to discharge the defendant, without his consent, although he may have given bond for the prison rules, and filed his schedule, with the view of taking the insolvent debtors' Act.

A prisoner confined under an order for bail, and who has filed his schedule with the clerk, and given notice to his creditors of his intention to take the insolvent debtors' Act, cannot take this Act where he has been discharged by the plaintiff at whose suit he has been arrested.

It is questionable whether a defendant can be arrested pending a suit, where he has been previously arrested and held to bail, and by the plaintiff discharged.

Before GANTT, J., at Abbeville, Fall Term, 1840.

This was an application for a discharge under the insolvent debtors' Act.

The defendant was arrested on the 22d February, 1840, by the sheriff, by virtue of an order for bail, and on the same day gave bail. On the 24th February, 1840, he was surrendered by his bail, and gave other bail. He was again surrendered by his last bail, to the sheriff, on the 20th day of March, 1840, and gave bond and security for the prison bounds. On the 22d April, 1840, he filed his schedule in the clerk's office, and on the same day gave notice to his creditors of his intention to apply to the Court at this sitting for his discharge under the "insolvent debtors' Act," upon his executing the assignment required by the Acts aforesaid. On the second bail bond was endorsed the following discharge:

"South Carolina—Abbeville District. We do hereby discharge the bail from all liability on account of this case.

"WARDLAW & PERIN,
"Attorneys for Clarke, McTier & Co."

Another paper, executed in like manner as above, directed to the sheriff, authorizing him to discharge the defendant from confinement without liability to the sheriff. This paper was not produced to the Court, but it was not questioned that such a paper was executed. The discharge by this Court of the defendant was resisted, on the ground that he was not now in the custody of the law; that the plaintiffs had already discharged the defendant, and that the defendant was not now entitled to the benefits of the discharge under the insolvent Act.

*The Court was of opinion that the plaintiffs could not discharge the defendant without his consent; and he having refused [*287 to go when the plaintiffs desired, that he was still in the custody of the sheriff; and that he was entitled to his discharge, with all the benefits of the Act; and so ordered.

The plaintiffs, Clarke, McTier & Co., move to vacate the order of discharge, because the defendant, under the circumstances, was not entitled to the benefit of the insolvent debtors' Act.

Wardlaw and *Perrin*, for the motion. The question is, whether a plaintiff can discharge a defendant, after an order for bail?

The whole object of bail is, that the plaintiff may have some security for his debt.

An arrest under a bail writ is different from arrest under *ca. sa.* Mr. W. referred to the oath of the insolvent debtor.

Burt, contra, cited Act 1815,(*a*) and said that it applied only to final process.
The defendant can only be discharged by his own consent.
Defendants would be often liable to be harassed and put in jail on the same case, if they were discharged without their consent.

Curia, per EVANS, J. It is on the application of the plaintiff, and for his benefit, that the body of the defendant is arrested, and held in custody of the sheriff, or the custody of his bail, to satisfy the plaintiff's judgment when rendered. Being, as it certainly is, a mere security for the plaintiff, I am at a loss to conceive of any reason why he may not waive this advantage by releasing the bail, or by discharging the defendant from the custody of the sheriff. The only supposable objection that has been urged is, that the plaintiff may again arrest him, and thus harass the defendant by discharges and fresh arrests. Prior to the Act of 1827,(*b*) no bail could be required pending the suit, and the object of that Act was to remedy this defect of the law. Without expressing any definite opinion on the subject, I think it may well be questioned whether a defendant can be arrested pending a suit, when he had been previously arrested and held to bail by the plaintiff, and by him discharged; so that *288] it is not likely that the *supposed evil can ever arise. I see nothing, therefore, either in reason or in the authority of any decided case, which will prevent the plaintiff from discharging the defendant from the custody of the sheriff, as was done in this case; the effect of which is to restore the defendant to his liberty, and to authorize him to go wheresoever he pleases. If he remains after this, his residence in the jail or the prison rules is entirely voluntary, and of his own free will.

But it is supposed that by the arrest, the defendant has acquired a right to make an assignment of his property under the Act of the Legislature, passed for the relief of insolvent debtors, of which the plaintiff cannot deprive him by a discharge against his consent. I am unable to discover from whence such right is derived; if it is found any where, it must be in the Act of 1759,(*c*) under which the defendant claims to be discharged from the plaintiff's debt, as well as the debts of all his suing creditors, upon an assignment of his schedule. I think there can be but little doubt that after the discharge, the defendant can no longer be regarded as a prisoner; his remaining in the jail is of his own accord, and not by any compulsion of the plaintiff. Let us now, by examining the insolvent laws, see whether such a person is entitled to the benefit of its provisions. The first clause begins by declaring that any one arrested may, within one month after he, she, or they shall be taken into custody, exhibit a petition, setting out the causes of his, her, or their imprisonment. In another part of the same clause, it is said the Court shall, in a summary way, examine into the matter of the said petition, and shall hear what shall be alleged against the discharge of the said petitioner. The oath to be administered to him is that he has been a prisoner in the common jail, without his consent or procurement. The 12th section provides that no one shall be entitled to the benefit of the Act, unless such person shall have actually remained confined in the common

(*a*) 6 Stat. 1. *An.* (*b*) 6 Stat. 337, § 3. *An.* (*c*) 4 Stat. 56. *An.*

jail, &c. The 13th section authorizes the justices, in case they suspect the person applying has not rendered in a true account of his estate, to re-commit such person to the common jail, there to remain. The 20th section makes the arresting creditor "liable for, and chargeable with, the fees due to the provost marshal, for the arrest and imprisonment of such person." In the Act of 1788,(*a*) we find the persons entitled to the benefit *of that Act, described in the 2d section, as those committed on *mesne process;* in the 3d section, as *prisoners in execution;* in the 4th section, as any person "*confined on mense process.*" The fifth section extends the benefit of the Act of 1759 to all persons "*confined on mense process in any civil action, or on execution.*" These and similar expressions are to be found in almost every section of the Acts of 1759 and 1788, and show most clearly that none are entitled to the benefit of these Acts, except prisoners, those who are confined within the jail bounds; for the prison rules are but the enlargement of the jail. Does the defendant come within the provisions of these Acts? Can he be regarded as one confined on *mesne process,* after the plaintiff has discharged him from the arrest? Is not his remaining in the jail, or the jail bounds, after this, entirely voluntary? And if so, can he swear he has been confined without his consent? After his discharge he was at liberty to go wheresoever he pleased. He was no longer a prisoner, or one restrained of his liberty. Upon a careful examination of the provisions of these Acts, I am satisfied a defendant has no other rights under them, than the right to be set at large and freed from imprisonment upon a surrender of his estate; and if he be discharged by the voluntary act of the plaintiff, the object of the law is obtained, and the debtor can ask no more. To authorize him to do what is claimed by the defendant, would be to enable him, by remaining voluntarily in jail, to make an assignment whereby the debt of the plaintiff, and the debts of all suing creditors are extinguished, against the will of his creditors; and more than this, he may subject the plaintiff to the payment of his legal fees, for the Act of 1759, and the Act of 1817, both make the plaintiff chargeable with the expenses of the imprisonment, in the event the assets assigned are not sufficient. These Acts go on the supposition that as the expenses are incurred at the plaintiff's instance, he ought to pay in the event they are not paid by the defendant or out of his assigned estate; but nothing could be more unreasonable than this, where the defendant remains in jail voluntarily and against the will of the plaintiff. Suppose the action should abate, or the plaintiff should discontinue, or be nonsuited, can the defendant still go on and be discharged from an action when none is pending against him? It was recently decided in a case in Charleston, not yet reported, and I do not remember* the names of the parties, that the defendant was not entitled to the benefit of the Act, where the plaintiff had discontinued his suit. I do not remember whether, in that case, the discontinuance was before or after the defendant had filed his schedule, and given his notice; but I apprehend that fact is immaterial and cannot vary the result. The oath he is required to take is, that he has been confined from the time of his being arrested, at the suit of ———, without his consent or procurement. How can this defendant

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(*a*) 5 Stat. 78. *An.*

swear he has been confined from the time of his being arrested, at the suit of the plaintiff, when he had been discharged from his confinement in jail, near two months before? After his discharge, his confinement was voluntary. The object of the insolvent Acts, it seems to me, is to enable the defendant, by a surrender of his property, to discharge himself from imprisonment, if his creditor persists in keeping him in jail; but the end is already obtained, where the creditor voluntarily releases him from confinement. Every clause in the Act shows that at the time the application is made, the applicant must be an imprisoned debtor. The defendant is not in that condition, and, therefore, the motion is granted.

RICHARDSON, O'NEALL and BUTLER, JJ., concurred. GANTT, J., dissented.

See N. Cohen's case, Charleston, January, 1859, 11 Rich. *An. Sleeper & Fenner* vs. *N. A. Cohen.*

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*291] CUTHBERT PRICE, Executor, *vs.* SAMUEL PRICE.

Where a general demurrer has been overruled, the adverse party have the right to enter up judgment on the matter in controversy, unless the demurring party obtain special leave to plead over at the time the demurrer is overruled.

Before BUTLER, J., at Chester, Spring Term, 1841

The plaintiff in this case had filed a general demurrer to the defendant's special plea, which admitted all that was stated in it. The Court of Appeals, on a former trial of this case, overruled the demurrer, and the Circuit Court gave the defendant leave to enter up judgment on the plea; from which the plaintiff appeals.

GROUNDS OF APPEAL.

1. That the plaintiff had, under the circumstances of the case, a legal right to reply to the defendant's plea of former recovery.

2. Because the plaintiff should have been permitted to go to trial, he having moved for leave so to do after the Court had refused plaintiff leave to reply to the defendant's demurrer sustained, as plaintiff contends he can recover in the case, even admitting the demurrer to defendant's plea is permitted to stand, or rather, is overruled.

Curia, per BUTLER, J. On a former occasion it was decided by this Court, that defendant's plea was an entire bar to plaintiff's action. Judge Earle, who delivered the opinion of the Court, makes this remark: "But whatever may be the effect of the record, when exhibited to the Court, in support of the plea, it is considered here, that there is enough on the face of the plea itself, to constitute a good bar, if it be verified by the record." We think that by the terms of the plea, which were admitted by the demurrer, the plaintiff was precluded from giving evidence to contradict it. He must be bound by his admission on the record; and the defendant's plea being admitted by demurrer, he was not bound to verify it by evidence. We will not say that plaintiff might not have obtained leave from the Court of Appeals, before its judgment was finally

delivered, to withdraw his demurrer, with leave to reply to defendant's plea. He made no such motion to the Court, *when it had the case under consideration, and the Circuit Judge was bound to [*292 make the decision, from which the plaintiff has appealed on this occasion. Where a general demurrer is overruled, the adverse party has a right to enter up judgment on the matter in controversy, unless the demurring party obtains special leave to plead over at the time the demurrer is overruled. Motion dismissed.

The whole Court concurred.

Thomson and *Eaves*, for the motion. *R. G. Mills*, contra.

See 7 Rich. 432. 5 Stob. 157. 1 N. & McC. 88, 108. 2 McM. 292, and cases in note there. *Smith* vs. *Singleton*, Charleston, February, 1852.

MARY DIAL and W. HENDERSON *ads.* P. FARROW.

A Court of Law has the power to vacate or set aside its own judgments, when obtained by or founded in fraud.

The proper course to pursue, where a judgment is sought to be vacated, and affidavits are submitted by the defendant, is to take out a rule for the plaintiff, returnable to the next term of the Court, to show cause why the judgment should not be set aside.

Before GANTT, J., at Laurens, Spring Term, 1841.

This was a motion to open a judgment, and for leave to appear and plead to the case, or that the defendant have leave to file a suggestion to try the validity of the same. This application was founded on the affidavits of Mary Dial and William Henderson, stating positively that they never signed either the note or confession of judgment, or authorized any other person to do it for them; and upon the affidavit of Wm. C. Gary, whose name appears to be signed as the subscribing witness to the confession of judgment, that he never signed said confession of judgment as a witness, or ever knew any thing about it, until after G. C. Deal left this State; and that he is *well acquainted with the handwriting of Mary Dial and W. Henderson, and their names to the note and [*293 confession of judgment are not their handwriting.

His Honor refused to hear the motion, on the ground that the Court had no jurisdiction; from which the defendants appeal, and renew the motion before the Appeal Court, on the ground that the Court had jurisdiction, and the motion should have been granted.

Curia, per O'NEALL, J. That the Court of Law has not the power to set aside its own judgments, when founded in fraud, would be a strange proposition. For certainly if the judgment becomes thereby void, and another tribunal could relieve against it, there can be no good reason why the Court pronouncing the judgment should not vacate it. Indeed, there is great propriety in a Court vacating its own judgment, when it is rendered under such circumstances of mistake, fraud, or surprise, as would entitle the party to relief elsewhere. The case of *Posey* vs. *Underwood*,

(1 Hill, 262,) states the true rule. The power of setting aside judgments, it remarks, "is exercised as between the parties, on matters out of and beyond the record, as when a judgment has been obtained by duress, by misrepresentation to the defendant, or an abuse of the process of the Court."

The case made by the affidavits is, that the confession was not signed by the defendants, Mary Dial and William Henderson. If this be so, the predicate of the judgment is destroyed, and the Court had no power to give it, and it is as much a duty to set it aside, as it would be to set aside a judgment where the defendant had not been served with process. I think it is very probable, from the affidavits submitted on the part of the plaintiff, that there is no foundation in fact for the motion to vacate the judgment.

Whether there is or is not, it is perfectly clear that no blame can attach to the plaintiff, for if the defendants have been improperly subjected to the judgment, it has been by the forgery of their co-defendant, G. C. Dial, committed with a view to defraud the plaintiff. The collision between the affidavits makes it necessary that the case should pursue the only course by which truth can be elicited—a trial by jury. The proper
*294] course would have been, on the showing of the defendants, to *have granted a rule against the plaintiff, returnable to the next term, to show cause why the judgment should not be set aside, and to have directed that the affidavits submitted by the defendants should be filed. To them the plaintiff would have answered by filing counter affidavits. But as affidavits on both sides have been submitted, and the conflict in fact is apparent, the order will be made at once, which the Circuit Judge might have made. The motion to reverse the decision below is granted. The affidavits submitted by the defendants and plaintiff, are ordered to be filed in the clerk's office of Laurens District, and the defendants have leave to file their suggestion to set aside the judgment of *Patillo Farrow* vs. *G. C. Dial, Mary Dial, and Wm. Henderson,* on entering into a consent rule to pay to the plaintiff all costs which he may incur thereby, if they should fail in setting aside the said judgment; and the said plaintiff is ordered to plead to the said suggestion so to be filed. The defendants to be the actors in the said suggestion.

The whole Court concurred.

Irby, for the motion. *Young,* contra.

See 4 Rich. 168, 512; 6 Rich. 491, 495; 1 Sp. 39, 114. *An.*

THE OWNERS OF THE STEAMER ST MATTHEWS *vs.* I. D. MORDECAI.

Where the plaintiff's demand has been reduced by a discount below the *sum. pro.* jurisdiction, the practice is to give a decree for the balance.

Before O'NEALL, J., Richland, Spring Term, 1841.

This was a *sum. pro.* to recover the freight, $32.49, on certain articles shipped from Charleston to Columbia, on board the Steamer St.
*295] Matthews. She reached her usual port of delivery, *Granby. She could not, at any time, ascend further up the river. The

goods of the defendant were delivered to a wagoner, to be by him delivered. This was the course usually pursued. A part of them came properly to hand. A parcel of buckets were sent to Union district. After some time they were recovered by the agent of the boat, except two, which were lost. Sixteen were injured. The defendant refused to accept them; but, at last, did receive them into his store, and had a survey made by Mr. Solomons, who said that the two lost were worth $6, and the sixteen damaged were injured, each, $1. The defendant relied on a discount for the lost and damaged articles, as well as on the defence, that the steamer did not deliver the goods shipped.

I allowed the defendant a discount of $22, and gave plaintiff a decree for $10 49. The defendant appeals on the annexed grounds.

1. That the culpable negligence of a carrier ought to vitiate his whole claim under his implied contract, which he has wilfully neglected to fulfil.

2. That the defendant, having expressly refused to accept his damaged goods, ought not to have been held to have accepted them at their damaged value, only because he allowed them to lie in his store.

3. Because his Honor gave judgment for a sum less than the jurisdiction of the Court.

Cheves, for the motion, cited 3 Hill, 202; *Caldwell* vs. *Garmany*; *Saunders* vs. *Gage*, Cheves, 165, and said the plaintiff was not entitled to freight until the goods were delivered. The plaintiff, said Mr. C., was proved to have known the amount of this discount.

Gregg and *Gregg*, contra.

Curia per O'Neall, J. The motion for a new trial in this case, has been at rest altogether upon the 3d ground. As to which, it may be remarked, that the defence of the defendant arose altogether from a matter of which he could only avail himself by discount. For the plaintiffs proved their title to demand their freight, $32 49, by showing a delivery of all the *articles shipped on board the steamer, except two buckets. For the value of these, and the injury done to sixteen others, in their travel to Union and back again, the defendant was entitled to compensation. This was clearly a cross demand by way of discount, *Ewart* vs. *Kerr*, (Rice's Rep. 205.). Where the plaintiff's demand is reduced by a discount, to a sum below a magistrate's jurisdiction, the practice has been uniform, to give a decree of such balance. It is clearly distinguishable from the case where the demand is reduced by payments. There, the plaintiff has no right to demand more than the balance left after deducting the payments. But where, as in this case, the defence arises from matter which may, or may not be applied to the reduction of the plaintiff's demand, and which, therefore, can only be insisted on by way of discount, it does not have the effect of sending the plaintiff to an inferior jurisdiction, if his demand should be thereby reduced to a sum of which a magistrate has cognizance. [*296

The case of *Smith* vs. *McMasters*, (3 McC. 288,) is an illustration of the rule. The plaintiff there sued for $48, the defendant pleaded a discount, the plaintiff had a decree for 75 cents. It was held that the plaintiff was entitled to tax process costs against the defendant.

The motion is dismissed.

The whole Court concurred.

See *Owens* vs. *Curry* 3 Strob. 261. *Vaughn* vs. *Cade*, 2 Rich. 50. *An.*

*297] *JANE STEELE *vs.* JENNINGS & BEATY.(*a*)

A promise by one co-partner, after dissolution of partnership, cannot create a new liability against the other partners on a simple contract, barred by the Statute of Limitations before the dissolution.

A defendant is not precluded from availing himself of the Statute of Limitations, by the remark of his counsel, in argument, "that his client would scorn to take advantage of the statute, if it could be made to appear that the money had been applied to the business of the firm."

Before BUTLER J., at York, Spring Term, 1841.

This was an action of debt, nominally against both defendants, the real object of which, however, was to make Beaty liable for money borrowed by Jennings alone, but borrowed in the name of the firm of Jennings & Beaty, whilst they were partners in trade. Defence—general issue and statute of limitations. In 1828, Jennings borrowed of plaintiff $100, in the name of Jennings & Beaty, and gave a sealed note for the amount, signed Jennings & Beaty. In the latter part of the year 1832, the co-partnership was dissolved, the sign taken down, and the goods divided. In 1837, for the first time, demand was made on Jennings for payment of the note. He said then, and frequently afterwards, that the money was justly due, and should be paid when he made collections. He became insolvent and unable to pay, and this action was brought against Beaty in 1839 or '40. He resisted judgment, in the first instance on the ground that he was neither liable on the sealed note, nor for money borrowed, as it had been borrowed by Jennings, without his consent, and not for the use of the firm. I was entirely satisfied that Jennings had borrowed the money on the credit of Beaty's name, but had applied it exclusively to his own use. This action, so far as Beaty is concerned, must be regarded as brought on the demand for money lent, and the question is, has the demand been barred by the statute of limitations. The statutory bar was complete some time in 1832, and more than four years had elapsed from that time till the demand on Jennings, when he promised to pay the debt. The question is, can one partner be made liable on an assumpsit of another, made more than four years after the dissolution of a co-partnership. I held not, and the jury found for the defendants.

*298] *The plaintiff appeals, on the following grounds:

1. Because his Honor, Judge Earle, erred in granting leave, at Chester, to the defendants, to plead the statute of limitations.

2. Because his Honor, Judge Butler, erred in charging the jury that the acknowledgment and promise by the defendant, Jennings, to pay the debt, was not binding upon the defendant, Beaty.

3. Because his Honor erred in charging the jury that the defendant's, (Beaty,) solemn promise, made at the time, not to plead the statute of limitations, was not binding upon him.

A. W. Thomson, for the motion, contended that the co-partnership, (as he understood the law,) was still in existence, so far as this plaintiff was concerned, and the declarations of Jennings, down to this day, are binding upon Beatty. The plaintiff must have notice of the dissolution, and it must be proved that she had notice of such dissolution. Cited 1 Salk. Rep. 29; 2 Doug. Rep. 622. A promise of one partner, after dissolution, may bind the other, by a promise concerning a partnership debt. 3 Johnson, 536; 6 *id.* 267; 10 *id.* 35; 15 *id.* 409; 2 Const. Rep. 111; 2 Tread. Const. 685; 2 Bay Rep. 523; 1 M'Cord, 541; 3 *id.* 278.

G. Williams, contra, submitted the case.

(*a*) S. C. before Chev. 183.

Curia per BUTLER, J. So far as it regarded Beaty, this was originally a simple contract, and was barred by the statute of limitations in 1832, or at furthest, in 1833. During the existence of the co-partnership, Jennings was, to some extent, confining himself to the business of the firm, the agent of Beaty, and might subject him to liability for contracts made on the credit of his name. After their partnership connection had ceased, as it did, by a notorious dissolution in 1832, Jennings had no power to create a new liability against Beaty. Now, what is the state of the case? Nine years after a right of action had accrued, and four years after it was completely barred by the statute of limitation, and when in effect it was paid, and five years after the dissolution of the co-partnership, *an attempt is made to make [*299
Beaty liable on the acknowledgment of Jennings. In effect, the proposition contended for, is to perpetuate the agency of one partner, to create new debts against another. In 1833, this demand against Beaty might be regarded as entirely extinguished; and at that time, Jennings had no control over his former partner's contracts, which were not then subsisting. His acknowledgment, therefore, made in 1837, can have no effect on the liability of Beaty, who, it would seem, had no notice of this demand until a short time before this action was brought.

It was contended, however, that the plaintiff had no notice of the dissolution. After such a lapse of time, where the parties live in the same neighborhood, as they did here, all concerned may be very well presumed to have notice of the fact of dissolution.

The last ground of appeal, perhaps, requires some explanation. On the former trial of this case, the counsel of Beaty, in his argument to the jury, remarked, that his client would scorn to take advantage of the statute, if it could be made appear that the money borrowed had been applied to the business of the firm. This was the extent of Beaty's pledge not to plead the statute, and there is certainly nothing in it to preclude him from availing himself of it now. It was not made by himself, and he is not satisfied that Jennings applied the money to the firm. Judge Earle's order being sufficient authority for filing the plea, the motion is dismissed.

The whole Court concurred.

See 4 Strob. 220; 6 Rich. 219–29; 9 Rich. 44. *An.*

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*J. RAMEY, TREASURER OF THE ABBEVILLE SILK COMPANY, *vs.* W. C. ANDERSON.(*a*) [*300

A promise to pay the "Treasurer of the Abbeville Silk Company," is binding upon the subscribers to the stock of said company; and an action may be maintained against any subscriber who does not pay up his subscription, by any one who may be Treasurer at the time the action is to be commenced.

Before EVANS, J., at Abbeville, Spring Term, 1841.

This case presents the following facts:

The defendant, with others, were members of an unincorporated asso-

(*a*) Cited 9 Rich. 259.

ciation, called the Abbeville Silk-growing Company. The company had been organized, and officers appointed. The capital stock consisted of shares, each member subscribing for a certain number. The defendant subscribed for ten shares. By the articles of association, signed by the members, each subscriber promised to pay the value of his shares, in certain instalments, when required by a resolution of the company. One instalment was called for, which defendant refused to pay. By the articles, the subscribers promised to pay the treasurer of the company. Dendy was the first treasurer, and probably held the office when the articles were signed, but the plaintiff was treasurer when tho action was brought. I considered the promise to pay as binding, and the action might be brought in the name of any one who was treasurer at the time, and decreed for the plaintiff.

The defendant appeals, and will move to reverse the decree:

Because the Treasurer of the Abbeville Silk Company being neither a public officer nor a corporation sole, the plaintiff showed no right to maintain this action.

Curia, per EVANS, J. The Abbeville Silk-growing Company is not a corporation. It is a mere co-partnership, and of course, as the defendant is one of the company, the others cannot sue him at law, and if this action cannot be maintained, no other person can sue. It is not intended to controvert the truth of the general proposition that the action must be in the name of him who has the beneficial interest in the con-
*301] tract. If a contract be made with an agent, for the use and *benefit of his principal, the action must be in the name of the principal. That was decided in the case of *Pigott* vs. *Thompson*, (3 Bos. & Pul. 148;) *Allen* vs. *Brasier*, (2 Bailey, 55,) and in various other cases. But in all these cases, those entitled to the beneficiary interest, were either persons or corporations who could sue. In the case under consideration, the very object of the stipulation to pay to the treasurer may have been to avoid this very objection. It is a contract valid and binding in law, founded on sufficient consideration, and ought not to fail on account of an objection which it seems to me the defendant waived, when he entered into the contract. But it is further objected, that even if the defendant is liable to an action at the suit of the treasurer, he is only liable to him who was treasurer at the time of the contract, or to him who was treasurer first. It is somewhat uncertain, on the evidence, whether at the time the constitution or articles of association were signed, there was any treasurer designated. It is more than likely the articles were signed before there was any election of officers. But, be that as it may, I think it wholly immaterial as to this case. The general rule is, a contract made with an agent, does not devolve on his successor, except in the case of public officers, corporations sole, and perhaps some other cases. In this case, the money was not payable immediately. The contract was to pay at such time and in such sums as the company should require. The fair interpretation then is, that the defendant promised(*a*) to pay, when called on by a resolution of the company, such sums as might be required, to him who then held the office of treasurer. The

(*a*) To whom? *Rn.*

plaintiff answers to this description of the payee. He alone could discharge the debt. He had an interest in the contract, because he was entitled to commissions; and as no one else could maintain an action upon the contract, it has been properly brought in his name, and the motion is dismissed.

GANTT, RICHARDSON, and O'NEALL, JJ., concurred.

Wardlaw and *Perrin*, for the motion. *Wilson*, contra.

See 4 Rich. 100. *An.*

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*WM. COXE *vs.* J. GENT. [*302

When a case is referred to arbitration, the object is to supersede, by the judgment of the arbitrators, the verdict of a jury. It would follow, that the award should be either for a certain sum ascertained, or for a sum capable of being ascertained by reference to some part of the record.

Before EVANS, J., at Abbeville, Spring Term, 1841.

This case came up under the following statement of facts:

An action was pending by the plaintiff against the defendant on a note signed "Fielding and Jesse Gent." By an agreement between the parties, at or before the last Court, the case was to be marked continued, and was to be settled by the award of arbitrators. The award to be final, as the judgment of the Court. The arbitrators were chosen and an award was made, as follows: "The undersigned, a majority of the persons chosen to arbitrate and settle the case between Wm. Cox, Senr., plaintiff, and Jesse Gent, defendant, in relation to a certain note, made payable to said Cox, by Fielding Gent, with Jesse Gent's name signed, have heard the evidence, and according to their judgment of the facts, do find for the plaintiff the amount of the note."

At this term the plaintiff's attorney moved to confirm the award, and for leave to enter up judgment upon it. The note was copied on the declaration.

I refused this motion. 1st. Because the award was for no definite sum. 2d. Because the award did not refer to any particular note, by such description as would connect it, with certainty, with the note sued on, so as to authorise the entering up the judgment for any certain amount.

The written submission was entitled thus:

"WM. COX *vs.* JESSE GENT. } Assump. Note. Abbeville District. In the Common Pleas."

The plaintiff appeals. Because, by proper reference, the award may be made sufficiently certain.

**Wardlaw* and *Perrin*, for the motion, said that the award was sufficiently certain, and cited in support of this position, 1 American C. L. R. title Award and Arbit.; 8 Peters, 177, *Luths* vs. *Wesickin;* 2 Strange, 1082; 2 M'Cord, 279. [*303

A misrecital of an award, has been held not fatal, and on this point cited 1 Ven. 184.

In reply, said there is more latitude given to an award than a verdict.

Burt, contra, said that judgments are taken by the English practice in advance of the order for arbitration, and referred to Watson on Awards, 194; 1 East Rep. 401.

There is not a sufficient description of the note sued on in the award.

If judgment had been given upon this award, defendant could not have been protected from a future suit.

Arbitrators could not try the question of whose note it was.

Curia, per EVANS, J. Upon a review of all the facts of this case, I concur with my bretheren, that there was error in the circuit decision. The award states the case which the arbitrators decided, to be one in which Wm. Cox was plaintiff, and J. Gent, defendant. Connecting this with the fact that the award signed by the arbitrators is directed to the clerk of the Court, there was, I think, sufficient evidence to identify the award with the case on the docket. When a case is referred to arbitration, the object is to supersede, by the judgment of the arbitrators, the verdict of a jury. It would follow from this, that the award should be either for a certain sum ascertained, or for a sum capable of being ascertained by reference to some part of the record. The usual form of a verdict in debt or bond is, "We find the writing obligatory within declared on, to be the deed of the defendant." This has always been regarded as sufficient, without the specification of any particular sum in the verdict. The sum is ascertained by reference to the declaration. So, in this case, the award is, we find for the plaintiff the amount of the note. This is equivalent to a finding for the amount due on the note described in and copied on the declaration. This Court is therefore of
304] opinion, that the presiding judge ought to have granted the motion, unless there were other objections to the confirmation of the award. The motion to reverse the decision of the Circuit Court, is therefore granted, subject to the right of the defendant to impeach the award on any other ground.

The whole Court concurred.

As to certainty by reference. Infra, 429. *An.*

WILLIAM B. CALHOUN *vs.* B. REYNOLDS *et al.*

A note dated January the 8th, 1838, with the words, "with interest from the first day of January last"—*Held*, that the time from which interest was to be computed, was the first day of January, 1837.

The rule of law is, that a doubt shall be solved against him whose business it was to speak without ambiguity.

Before EVANS, J., at Abbeville, Spring Term, 1841.

This was an action brought on a note, by which the defendants promised to pay "eight hundred dollars, with interest from the 1st January last." The note was dated 8th January, 1838. I was of

opinion the 1st January last, did not mean the then month of January, but the 1st January 1837, and so directed the jury; the jury found accordingly.

The defendants appealed, for error in the above instructions.

Curia, per EVANS, J. If the note had been dated in any other month than January, there would be no difficulty in construing it; or if it had referred to any remarkable period of time, as last Christmas, or last new year, or last fourth of July, there would be no uncertainty in the meaning. What is meant by the "first January last?" Does the word *last* qualify *first* or *January?* Is it the *last first day of January*, or *the first day of last January?* I thought on the trial that **last* applied to January, and that the defendant did not mean the first of the then [*305 month of January, but the first day of the preceding January, that is the 1st January, 1837. In this opinion my brethren concur, and especially for the reason that the doubt arises on the language of the defendants, and the rule of law in such case is, that the doubt shall be solved against him whose business it was to speak without ambiguity.

The whole concurred.

Wardlaw and *Perrin*, for the motion. *Burt*, contra.

See *Posey* vs. *Branch*, 2 McM. 339. *An.*

TOLIVER TRAMMELL *vs.* W. H. ROBERTS *et al.*

The subscribing witness to a contract, whether under seal or not, must be produced to prove the instrument, if alive and within the jurisdiction of the Court. It is incompetent to prove it in any other way.

Before GANTT, J., at Greenville, Spring Term, 1841.

The facts of this case appear from the following report of his Honor:

W. H. Roberts purchased of the plaintiff a horse, and gave his note to secure the consideration agreed to be paid for him, to which he signed his own and the names of Dennis and Thomas Westmoreland. The name of Kevil Roberts was attached to the note as a subscribing witness. He had not been summoned to give evidence as to the execution of the note by defendants. It was stated by the counsel for the defendants, that on filing the plea by Thomas Westmoreland, an affidavit had been made, that the note was not his.

*From the circumstances, as proved, I thought this case might be considered an exception to the general rule. Thomas West- [*306 moreland might well swear that he had not signed the note, but it clearly appeared from the evidence, that both the Westmorelands had authorized W. H. Roberts to affix their names as parties to the contract. The plaintiff, Trammell, after the note had been taken, had an interview with the Westmorelands, and desired to know of them, whether Roberts had been authorized to sign their names; they replied in the affirmative, and assigned the reason why they agreed to it. It appeared by the testimony, that the subscribing witness was out of the neigborhood; that he

led an itinerant life, and a rumor prevailed that he was out of the State. A witness, however, testified that he was a native of Laurens district, and that he had recently seen him there.

It appeared to me, that had the witness been present, he could not have testified to the facts which fixed the responsibility of the two Westmorelands, more firmly than what was established by the testimony offered.

Their liability or not to the payment of the note sued on, depended upon a fact *aliunde*—the execution of the note.

I therefore overruled the motion for a nonsuit, on account of the failure of the plaintiff in not having the subscribing witness in Court, and deeming the testimony offered sufficient to fix the liability of Thomas Westmoreland, I signified as much to the jury in my charge, who found accordingly.

The defendants move the Appeal Court for a nonsuit in this case, and for a new trial, on the ground:

That his Honor charged the jury that the plaintiff had proved the note, the subject of this suit, without the production of the subscribing witness, or accounting for him, by proving the handwriting of the parties and their declarations, notwithstanding the defendant, on filing his plea, also filed his affidavit agreeably to the Act of 1802, that the note was not his, and it appearing that the witness was residing within twenty-two miles of Greenville Court-house.

Choice, for the motion. The question for the Court is, whether the party, under the Act of 1802, on filing his plea, files also his affidavit, denying the signature to
*307] the note, the *plaintiff is not bound to offer or produce the subscribing witness to the note, or show that he has used due diligence in endeavoring to procure him. 2 Bay, 506; 1 McCord, 391; also, *Plunket* vs. *Bowman*, 2 McC. 138; 3 McC. 219.

The subscribing witness to a bond or note, must be produced, if alive or within the State. 1 Starkie on Ev. 236.

Townes, contra. It was not necessary, under the circumstances, to prove the note by the subscribing witness—taking the admissions of the defendant.

The admission of a party is sufficient to bind him in all cases, and is the highest evidence.

If the witness to the note had been present, he could only prove what plaintiff admitted. 2 Johnson, 451; *Hall* vs. *Phelps*.

Curia, per RICHARDSON, J. The verdict is, perhaps right according to the evidence before the jury, and would have been satisfactory, but for the strict rules of law. The question is, whether the evidence received to prove the signatures to the note, was competent in law, when Kevil Roberts, the subscribing witness was within the reach of the Court, and might have been brought to testify, in person, to the contract he witnessed. In such a case, and at common law, the subscribing witness must have testified in person, and in case he were beyond the reach of the Court, then other witnesses, by proving his handwriting, and the signatures of the makers of the note would furnish legal, though secondary evidence of the same facts. (See 1 Starkie, 126–30, and the cases cited.) But does the Act of 1802, (5 Stat. at large, p. 435,) alter this rule of the common law, in such a case?

The Act declares that "the absence of any witness to a bond or note, shall not be deemed a good cause for postponing a trial," &c. "But

that the signature to such bond, or note, may be proved by other testimony, unless the defendant, at the time of filing his or her plea should swear," &c., "that the signature to the bond or note, is not his or her's."

In the case before us, one of the defendants had, in fact, so sworn, and that being done, it follows that the case was taken out of the provisions of the Act, and stood at common law as if no such Act had been passed. We must then judge the case by the common law rules already noticed. But *it may be satisfactory to observe that the object of the rule, [*308 that competent or the best evidence shall be adduced, is not merely that conviction or belief of the jury, upon the facts of the case, shall be produced, but that such belief shall be produced by legal evidence; and the decision of the Court turns upon that distinction.

Why is it, that without competent evidence, no case can be heard, and nonsuits are ordered? It is lest belief should be impressed upon the jury by illegal evidence, and verdicts be given through partiality, preju dice, or credulity, which are human weaknesses; and the law being unable to control them, yet limit their influence by known rules or measures of evidence, which the Judge is to apply according to the legal character of the evidence offered

It is plain, then, that the rule in question has a sound policy, similar to that of the Act requiring three witnesses to the last will, or to the rule of the civil law, which requires two witnesses to a fact. There is safety in such guards, against partial decisions, as well as frauds, and the uniformity and coherence of laws depend greatly upon the adherence to its rules of evidence. However probable it may therefore be, that the evidence of Kevil Roberts will not alter the verdict, yet, the reasons of so established a rule require that there should be a new trial in order that the verdict may follow legal evidence.

O'NEALL, EVANS and BUTLER, JJ., concurred.

See 11 Rich. 318, and cases there cited. *An.*

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*JOHN ADAMS *vs.* F. CRIMAGER. [*309

Where there are several executions in the sheriff's office against the same defendant, of different dates, the defendant may, on paying money to the sheriff, direct its application, and the sheriff, on rule, will be protected.

A receipt from the sheriff, when money has been paid on a junior execution, is a discharge to the defendant *pro tanto* on the execution.

Before EARLE, J., at Lancaster, Fall Term, 1840.

The plaintiff's execution was lodged 16th March, 1840. An execution at the suit of Weed, Benedict & Co., was lodged the 13th of April, 1840, against the same defendant, who paid to the sheriff, on 16th July, $178.14, which he directed to be applied to the payment of the last mentioned execution, and took a receipt from the sheriff entitled of that case.

This was a rule on the sheriff, who has the money yet in his hands, at

the instance of Adams, to show cause why the money should not be paid over to him, as the oldest execution creditor.

As the money did not arise from the sale of property, the lien of the execution did not attach upon it. A payment of the money by the defendant, to the plaintiffs, Weed, Benedict & Co., themselves in person, would have been protected as a valid payment. It would have been a mere preference of one creditor to another, which, under the circumstances, the defendant had a right to make. I think, on principle, the payment of the money to the sheriff, makes no difference, as he gave directions how it was to be applied; which directions the sheriff has consented to obey, by giving a receipt accordingly. The sheriff, on a *fi. fa.* could not levy on the money in the pocket of the defendant, nor compel him to pay it to the execution of Adams. The sheriff had two executions, and the defendant selected which he would pay; it is the common case of one owing several debts, and making a payment, directing the application of the money. The sheriff's receipt is at least a discharge of the defendant *pro tanto* on the execution of Weed, Benedict & Co.

I dismissed the rule, and the plaintiff appeals, on the ground:

*310] *That the Court erred in ruling that "where there are several executions in the sheriff's office, against the same defendant, of different dates, the defendant may, on paying money to the sheriff, direct its application; and that the sheriff is not bound to apply money, so paid, to the oldest execution."

Clinton and *Hanna*, for the motion, contended that money is subject to levy under execution, and it was the business of the sheriff to levy, in this case, in favor of the oldest execution.

Cited 1 McCord, 395; Dalton, 145. The execution goes as well against money as other property. 1 Cranch, 117, to show that money may be levied on under execution. 12 Johns. 220; *Id.* 395; 2 N. & McC. 341; 1 Bail. 39; *Means* vs. *Vance*, 2 Hill, 406. In the case at bar, the sheriff received the money as sheriff. 4 McC. 8; P. L. 379. The oldest execution must be satisfied.

Wright and *McMullin*, contra.(*a*)

Curia, per O'NEALL, J. We concur in the opinion of the Judge below, and adopt the reasoning by which he sustained it. It is, however, necessary to add, that in doing so, we do not question the authority of *Summers* vs. *Caldwell*, (2 N. & McC., 341,) nor of *Means* vs. *Vance*, (1 Bail. 40.) Generally, money is the subject of levy. But it cannot be said, that it is also subject to the lien of an execution. It has no earmark, by which it can be traced, and as the circulating medium of the country, it would not do to arrest its transfer from hand to hand by liens of which the receiver would be generally ignorant, and of which he would have no means of information. The most which can be said with certainty, as to the liability of money to levy is, that when it is within the power of the sheriff, as the property of the defendant in execution, it may be seized. But when the debtor delivers it to the sheriff, for one of his creditors, it comes into his hands and power, not as the property of the debtor, but as the property of the creditor. It is paid to him as the the agent of the creditor, and extinguishes so much of the execution on

(*a*) The Court refused to hear argument from the counsel against the motion, being satisfied with the opinion of the Judge below. REPORTER.

which it is paid. There is then *nothing to be levied by a senior execution. In *Means* vs. *Vance*, (1 Bail. 40,) which was a rule against the sheriff, (as this is,) to show cause why he did not apply the money collected for the defendant, on an execution, to the plaintiff's execution, Judge Nott said, "If, therefore, it had appeared that any other person had a legal, or even an equitable claim to the money, the Court ought not to have interfered in this way." This dictum would be enough for this case. For here, Weed, Benedict & Co. claim the money. It was paid to the sheriff for them: and hence, therefore, on rule, the Court would not deprive them of any right, legal or equitable, which they may have to it. Being paid to the sheriff, for them, he must pay it to them, and then if the plaintiff chooses, he may try their right to it by an action against them. [*311

The motion is dismissed.

The whole court concurred.

See *Lynch* vs. *Hanahan*, 9 Rich. 191; *Maddox* vs. *Williamson*, 1 Strob. 24, and cases there cited; 4 Rich. 130; 2 Rich. 528; Cheves, 113; 2 McM. 328. *An.*

Richard Lucas *vs.* Sanders & McAlilly.

One co-partner cannot bind another, by an obligation under seal, without express authority given or inferable from their course of dealing.

Neither can a recovery be had against one, upon a paper purporting to have been made jointly, as upon a joint and several obligation.

Before Butler, J., at Chester, Spring Term, 1841.

This was an action of debt, on the following paper:

"One day after date, we promise to pay Richard Lucas, or his order, three hundred dollars, for value received. Witness our hands and seals, May 11th, 1836.

"Sanders & Egger, [L. S.]
George McAlilly, [L. S.]"

*It was proved that the signatures were made by Egger, in the name of Sanders & Egger, at the time they were in co-partnership, and by McAlilly. On the night that the note was delivered to payee, Egger left the State, and this is an action against E. Sanders & George McAlilly. The declaration alleges that the note was made by Sanders & McAlilly, (Egger being out of the State.) The evidence was that Sanders did not sign the note; and the effort to show that he had authorized Egger to sign it for him, and for the firm, *under seal*, entirely failed, and the question made was, whether the plaintiff could recover against McAlilly alone. I held that he could not. [*312

The plaintiff moves to set aside the nonsuit, and for a new trial:

1. Because his Honor, the presiding Judge, decided that the plaintiff could not recover in this action, the suit being brought on a joint sealed note, executed by Egger, in the name of the firm of Sanders and Egger, and by George McAlilly, Egger not sued, (he being without the limits of the State.)

2. Because the Court decided that the plaintiff could not recover in this suit against George McAlilly.

3. Because the decision of the Court was contrary to law and the evidence in this case.

M. Williams, for the motion. This case was brought under the Act allowing joint obligors to be sued, when one of the parties is out of the State. Cited *Fleming* vs. *Dunbar*, 2 Hill, 532.

One co-partner can bind the firm, where it is shown that the profits arising from the contract went into the co-partnership. *Lockhart* vs. *Bell*, 2 Hill's Rep. 422; 1 Saunders' Plead.

Gregg and *McAlilly*, contra, offered no argument.

Curia, per BUTLER, J. The evidence in this case was entirely satisfactory, that Sanders had never given Egger express authority to subject him to liability by an obligation under seal, and without such authority, either expressly given, or inferable from their course of dealing, Sanders could not be made liable on such a paper. Whether the paper in question* could be regarded as the joint obligation of Egger & McAlilly, upon which one might be liable, the other being out of the State, is a question upon which I give no opinion. The case, as it now stands, is a joint action against Sanders & McAlilly. It is alleged that they made the note, when in fact, and in law, they did not. The position taken is, that in a joint action on a paper purporting to have been made jointly, a recovery may be had against one, as upon a several obligation. This is opposed to general authority, and express adjudications of the State. See *Ives* vs. *Picket*, (2 McC. 271;) *Lockhart* vs. *Bell*, (2 Hill, 422.)

*313]

Motion to reverse Circuit decision dismissed.

The whole Court concurred.

See 10 Rich., 151. *An.*

J. R. McKAIN *vs.* JONATHAN MILLER.

Any letters, such as "L. S." or a circumflex scroll, made by a party in connection with the words "*sealed*," or "witness my hand and seal," or proved by evidence *aliunde* to have been intended as a seal, will constitute a valid seal.

The intention of a party, where the letters "L. S." are annexed to his signature, is properly a question of fact for a jury to decide.

Before EARLE, J., at Sumter, Spring Term, 1841.

The plaintiff declared in assumpsit on a promissory note, and proved on the trial an instrument in the following words:

"$212 05. Camden, March 6th, 1840.

Six days after date, I promise to pay James R. McKain or bearer, two hundred and twelve dollars and five cents, for value received, with interest from the 1st January, 1840, as witness my hand and seal.

J. MILLER, [L. S.]"

*314] *The defendant's counsel, on the production of the paper, moved for a nonsuit, on the ground that it was a sealed instrument, and therefore assumpsit could not lie. The instrument was a printed form, except the sums, dates and maker's name. The letters L. S. were printed capitals, and there was no scrawl of any kind to denote a seal, and no parol proof of intention. "Witness my hand and seal," was also printed. I did not consider it as a sealed instrument, and overruled the motion. The counsel then made the same question to the jury, and it was submitted to them by the Court, with ample instructions, to say whether in fact the defendant intended, and the plaintiff accepted it as a sealed instrument. I explained the nature and office of a seal, and the material distinctions between sealed and unsealed instruments, especially in regard to the statute of limitations, and the order of paying debts against estates. I instructed them that less strictness was observed here on this subject than in England, and some other States; that any letters, as L S., or a scrawl, made by the party, in connection with the words "sealed," or "witness my hand and seal," or proved by evidence *aliunde* to have been intended as a seal, would constitute a valid seal. The printed letters L. S. only denoted where the seal should be, and were intended to represent a seal, were usually surrounded by a scrawl of the party, to denote a seal. In the absence of any thing done or written by the defendant here, to manifest an intention to adopt these letters as a seal, I thought the paper ought not to be regarded as a sealed instrument. The jury were of a different opinion; and, as they were instructed to do in that event, they found a verdict for the defendant, assumpsit not being the proper action.

The plaintiff appeals:

1. Because the printed letters L. S. at the end of defendant's name, does not constitute a sealed note, and is no seal.

2. Because, upon the proof made in the case, it was not the seal of the defendant.

Curia, per RICHARDSON, J. Whether the letters "L. S." annexed to the signature of Jonathan Miller, had been adopted by him for his seal, was a question of fact properly submitted to the decision of the jury. *Relph & Co.* vs. *Gist*, (4 McCord, *267.) And the jury having decided that such letters constituted his seal, the question for the [*315 Court to decide is, whether those two letters, not written, but in print, and standing without a circumflex, scrawl, or other visible mark of the pen of Jonathan Miller, can, in law, constitute his seal. It is not unfrequent, that such letters, when circumscribed by a scrawl, either in print or handwriting, constitute, in practice, a seal. And we cannot lay it down as a rule of law, that the letters alone, if used for such a purpose, may not be a valid seal. Any stamp, impression, or mark, made or adopted by the signer to a written contract, and annexed to his signature, *as and for his seal*, would seem to answer the purpose of sealing, in order to render such written contract a sealed instrument or deed in law. *McKenzie* vs. *Ioor and Mathews, MS. Dec.* 1833; Rice's Dig. 212; 4 McCord, 239. In such a case, the question is upon the intention and will of the signer. Did he or not intend to subscribe and deliver the contract as his deed, and not as a mere parol or written instrument?

And did he or not, actually adopt the letters, as and for his mark and exhibition of a seal? In a case like the one before the Court, where the signer affixes his name to the words, "as witness my hand and seal," there is little room to question his intention to seal the contract. For I can lay no stress upon its being printed. And wherever the intention to seal is so plain, the jury are warranted in inferring that the signer fulfilled his intention, practically, by adopting the printed L. S. as his promised seal. And this authenticates the contract, and renders it a deed in law, upon delivery. See *Mitchell* vs. *Parkham and Davis*, (Harper, 3.) The motion is therefore dismissed.

The whole Court concurred.

J. M. De Saussure, for the motion. *C. W. Miller*, contra.

NOTE. This case was submitted by both of the counsel without argument.
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See *O' Cain* vs. *O' Cain*, 1 Strob., 402. *Giles et al.* vs. *Maulden*, 7 Rich., 11; 1 Bur., 308; 11 Rich., 131. *An.*

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*316] *PITMAN & DAY *vs.* WILLIAM CLARKE.
HALL & CO. *vs.* THE SAME.

A Sheriff cannot be relieved from an attachment issued against him, nor can he have it dissolved, unless he can show that he has used all the means in his power, under the execution against the defendant, to obviate and repair the consequences of his former default; and that the loss to be suffered, did not arise from his negligence, but from the absolute insolvency of the defendant.

Before BUTLER, J., at Lancaster, Spring Term, 1841.

This was a motion to dissolve certain attachments, which had been issued at the instance of the plaintiffs, against Leroy Secrest, late Sheriff of Lancaster District, as for a contempt, in not collecting and paying over the money on certain executions of the plaintiffs, against the defendant; and also, for not returning the executions according to law.

RULE AGAINST PLAINTIFFS.

"An attachment having issued in the above cases, against Leroy Secrest, former sheriff, for not collecting and paying over the money, and returning the executions, in the above cases; and the said Leroy, since suing out the attachments, having sold all the property of defendant on the executions, and paid over the money, and returned the executions: on motion of *Clinton*, attorney for Leroy Secrest, it is ordered, that the plaintiffs in the executions show cause, during the sitting of this Court, why the attachments should not be dissolved; and that service of this rule be made on the attorney on record."

The following cause was shown to the above rule:

Thomas J. Wright, the attorney for plaintiffs, in obedience to the rule served upon him, requiring the plaintiffs to show cause why the attachments sued out in their favor against Leroy Secrest, late sheriff, should not be dissolved, respectfully submits for them the following cause, on oath.

The executions in favor of the plaintiffs against Clarke, were lodged in the sheriff's office on the 15th April, 1839. By law, it was the duty of the sheriff to make the money and return the executions at the next term of the Court

succeeding *their lodgment, to wit: at Fall Term, 1839. All this, however, the sheriff entirely failed to do, and during all this time, the defendant in [*317 the executions was continually engaged in selling and disposing of his stock of goods and merchandize, which, with a house and lot, constituted almost the only means out of which these debts could be levied. At Fall Term, 1839, a rule was taken out against the sheriff, to show cause why he had not made the money, which, on the 9th November, 1839, was made absolute against him, and it was ordered by the Court that he should pay the plaintiffs the debts, on or before the first Monday in December, 1839, or that an attachment should issue against him for a contempt.

This time being allowed to the sheriff expressly to enable him to remedy his past default.

But this order of the Court was likewise wholly disregarded by the sheriff, who permitted the defendant, Clarke, to continue, as before, to sell and dispose of his stock of goods, and consequently, to diminish the available means out of which it was possible for him, the sheriff, to make the money.

The house and lot of defendant, Clarke, was levied on, it appears, the 15th November, 1839, was not sold until the 3d of August, 1840, about nine months after he was ordered to pay the money. On the same day, the 3d August, as appears from the sheriff's sale book, the stock of goods and merchandise of the defendant was levied on, but not sold until the 3d November and 6th of December, 1840, more than twelve months after the order of the Court to pay the money. During a great portion of this time, as has already been stated, Clarke, the defendant in the executions, was engaged in selling off his stock, and thus wasting the means out of which the plaintiffs were entitled to have their debts satisfied, and out of which it was the imperious duty of the sheriff to have made the money; and during the same time deponent was urging him to do so. Besides, this deponent knows that the sheriff himself, after his levy on the goods, sold many of them at private sale; deponent, himself, purchased some of the goods thus, and knows of others having so purchased. This deponent further states, as a fact, that when the goods were ultimately sold, a large portion of them, as the sales book shows, were knocked down to John C. Secrest, a minor son of the sheriff, but were in fact bid off at the sale by the sheriff himself, in *clear [*318 violation of law. This deponent, too, believes that the sheriff has not yet sold all defendant's property which was bound by these executions, to wit, a horse, and, it may be, something else. The deponent further states, that he is informed, and believes, and is ready to make appear, by proof, that long before the sale of defendant's goods, as set forth in the sale book, the sheriff entered into a private agreement with Clarke, for the purchase of the stock of goods which were bound by the executions, and that according to the estimate placed on them, in that contract, their value amounted to $1600 or $1700. That it was agreed between them, that to confirm this sale, the goods should be offered by the sheriff, and bid off by some agent for him, he to be responsible to Clarke or Clarke's creditors for the price agreed on as aforesaid. That in pursuance of this arrangement, the goods were put up in bulk, and bid off by the sheriff, or some one for him, in the name of his minor son John C. Secrest, and that subsequent to this sale, he took possession of the store, and sold many of the goods at private sale; all which actings and doings were clearly and manifestly illegal and void. This deponent is informed, also, that the house and lot would have brought a much better price, if it had been sold on a previous sale day, on which it had been advertised; but the sale was capriciously, or from some cause known to himself, put off by the sheriff, to a time when the individual who wished to purchase was not present. The goods, too, when sold, were knocked off in great haste, and hence, necessarily, at a reduced price. Certain this deponent is, that the plaintiffs in the executions against Clarke, have been greatly delayed and injured by the sheriff's course in this matter.

Neither have the proceeds of the sale of the goods been paid over, unless within a few days a part may have been paid to the coroner. Neither has the sheriff to this day returned the executions according to law; nor can this deponent procure them either from the clerk's or sheriff's office. This deponent now submits, that in the order making the rule absolute, time was allowed the

sheriff to make the money out of Clarke's estate, and if, within that time, he had sold the whole of defendant's estate, he might have dissolved the attachment, nor would he have been opposed in that motion; but, as he flagrantly neglected
*319] his duty, and disobeyed the *order of the Court, and as he has permitted Clarke's estate to be wasted, and as it is clear that the plaintiffs have been delayed, hindered, injured, and in all probability lost their debts, by his negligence and malfeasance, he is not now entitled to have the attachment dissolved. All which is respectfully submitted.

Sworn to before me, this 9th April, 1841.

S. BECKHAM, *Clerk.*

The following endorsements and returns are made on the executions of Leroy Secrest, sheriff, to wit: on the execution of Pitman & Day, as follows: "Entered in my office, 15th April, 1839, L. Secrest, S. L. D." "I have levied on the house and lot, whereon the defendant lives, lying on Gay street, White street and B. F. Sadler's lot, and known in the plan of the town by Nos. 8 and 41, as the property of defendant. 15 Nov., 1839. L. Secrest, S. L. D." (Debt in part, $85.) "I have levied on the goods, wares, and merchandize, in defendant's store, as the property of defendant. 3 August, 1840. L. Secrest, S. L. D." "2d Nov. and 6th Dec., 1840. Goods sold for $851 85. An account of sales attached to this execution:" "I can find no more of the goods and chattels, lands and tenements of defendant, of which to make any other or more money. L. Secrest, S. L. D." Paid to the attorney, G. W. Williams, in the case of *J. W. Kerrby* vs. *W. Clarke*, before sale of lands and goods, $350 46, of debt and attorney's cost, for which I detain out of the sales of the goods.

Sales of the goods, - - -		$851 85
Paid on Kerrby's case, to G. W. Williams, - - -	$350 46	
" Attorney's cost, in the above case, - - - -	11 00	
" Sheriff's cost in the above case, - - - -	13 50	
" " " in Hall & Co's case, - - - -	16 00	
" " " in Pitman & Day's case, - - -	14 50	—405 00
		$446 39

The following return is endorsed on the execution of Hall & Co., to wit: "Entered in my office 15 April, 1839, L. Secrest, S. L. D. I have levied on the house and lot whereon defendant lives, on Main street, Gay street, White street, and B. F. Sadler's lot, and known in the plan of the town by Nos. 8 and 41, as the property of defendant, 15 Nov., 1839. L. Secrest, S. L. D." (Debt in part, $69.) Bid
*320] off by Caleb Clarke, *at $700, 3d August, 1840. Bid paid, and titles made, 3d Aug., 1840. I have levied on the goods, wares, and merchandize in defendant's store, as defendant's property. 3 Aug. 1840. Leroy Secrest, S. L. D. 2d Nov. and 6 Dec., 1840, goods sold for $851 85: an account of sales attached to this execution. I can find no more of the goods and chattels, lands and tenements of this defendant, of which to make any other or more money. L. Secrest, S. L. D. Sales of goods—how disposed of—see the case of Pitman & Day against this defendant. 5 Aug., 1840, paid to F. J. Wright, plaintiffs' attorney, $1000, of sales of land. L. Secrest, S. L. D.

Ent'd, 4 March, 1841. H. HANCOCK, S. L. D.

The sheriff, on his part, upon taking up the rule, submitted the following affidavit:

Personally appeared B. F. Sadler and J. Adams, and made oath, that they knew the property of Wm. Clarke for the last two years; that they also knew the time when it was exposed to sale by Leroy Secrest, late sheriff of Lancaster district, and believe the said property then sold for as much as it would have done at any time within one or two years previously. That part of the property of said Clarke consisted of goods, wares, and merchandize, he being a merchant. And we believe that the way in which the said goods were sold was the best that could have been prescribed, and that they brought as much or more than they would if sold in any other way. That they also believe the judgment creditors of said Clarke suffered no loss from the delay of said Secrest to enforce the said executions, further than the inconvenience arising from the delay of receiving the money.

Sworn to and subscribed by

B. F. SADLER,
J. ADAMS,
W. G. COXE.

The Court, after hearing the cause for and against dissolving the attachments, as aforesaid, made this order.

The plaintiffs, by their attorney, having shown sufficient cause to the rule taken out against them by Leroy Secrest, *Esq., late sheriff, [*321 requiring them to show cause why the attachment sued out in their favor against him should not be dissolved,—on motion of *Wright*, ordered that the rule be dismissed.

GROUNDS OF APPEAL.

1. Because his Honor held that he could not order the attachments to be dissolved, inasmuch as it would be setting aside the order of another Judge.

2. Because his Honor ruled that the contempt can only be purged upon the Sheriff's paying over to the plaintiffs, the whole amount of the executions upon which the attachments issued.

3. Because his Honor should have ordered the attachments to be dissolved, inasmuch as the sheriff, under the executions, sold all the property, real and personal, which defendant owned or possessed at the time, or since the lodgment of the executions, thereby putting the plaintiffs in as good situation as if the sheriff had sold before the return of the executions.

Clinton, for the motion, cited *Ex parte Thurman*, 1 Bail. 605. A party can only require the sheriff to place them in the same position that they would be had he done his duty.

There was no testimony that went to show that the plaintiffs in these executions have been damnified.

That the sheriff could meet them on the facts, if the Court would order an issue to try whether the plaintiffs have sustained any loss. Cited *Daniels* vs. *Capers*, 4 McC. 237.

Wright, contra.

Curia, per BUTLER, J. I did not, on the circuit, nor do I now, question the authority of the cases of *Ex parte Thurman*, *McClane* vs. *Duboze*, (1 Bail. 647.) It was decided in these cases, that a sheriff could be relieved from an attachment ordered against him, by having it dissolved, when he had shown that he had used all the means in his power, under the execution against the defendant, to obviate and repel the consequences of his former default; and when it appeared the loss to be suffered did not arise from his negligence, but from the absolute insolvency of the defendant in execution. There was *no negligence [*322 or contumacy imputable to the sheriff in those cases, for disobeying the positive instructions of the plaintiff, or refusing to comply with the order of the Court, to make the money, within the time limited. When a sheriff undertakes to vary from the requisitions of the law, in his mode of proceeding, and to consult his discretion and judgment, instead of obeying the mandate of the Court, he takes a position which entitles him to little favor and indulgence. A sheriff should never forget that he is a mere ministerial officer of the law, to execute, with little or no discretion, the judgment of the Court. The judgment, when pronounced, is the voice of the law, peremptory and explicit, and should be implicitly obeyed by every officer intrusted with its execution. When it shall be regarded as a reproach, that a sheriff is ruled for not making money, except in cases of controversy and absolute inability to raise it under *fi. fa.*, there will be fewer insolvent sheriffs, and a greater confidence in legal proceedings. When an officer asks for relief and forgiveness, he should

either show that he has committed no wilful fault, or that he has done every thing in his power to repair it. The sheriff, in the case under consideration, does not occupy this situation. He wilfully omitted to do his duty in the first instance, and when he was ordered to be attached for his default, instead of proceeding forthwith to make the money, within a time allowed him, and when he was required to do so by the positive instructions of plaintiff's attorney, he delays and consults his own discretion—pursuing a course not sanctioned by the law, and one which would lead to great mischief if countenanced by this Court, that of selling at private sale, property levied on under execution.

We cannot look beyond the return of Wright, the attorney, and that presents a case of culpable negligence on the part of the sheriff. Throughout he seems to have been utterly indifferent to legal process, and to have taken his own irregular and illegal course. He cannot complain if the consequences are visited on him. The decision below is affirmed, and this motion dismissed.

The whole court concurred.

See *Connor* vs. *Archer*, 1 Sp. 89; 2 Rich. 529. *An.*

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*323] *J. A. KENNEDY *vs.* JOSHUA SOWDEN.

The town council of Columbia, under the act of incorporation, have the power to enact by-laws, which shall be binding upon the persons and property, not only of the citizens of the town, but also of non-residents, when they come within the corporate limits of said town.

Before O'NEALL, J., Richland, Spring Term, 1841.

This was a summary process in trespass to recover for a hog seized by the defendant, as a marshal of the town of Columbia.

The plaintiff lives outside of the corporate limits of the town of Columbia. One of his hogs was found at large in the street. The defendant, under the ordinance* of the 9th September, 1839, to prevent goats and

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* AN ORDINANCE to prevent goats and swine from running at large within the limits of the town of Columbia.

Be it ordained by the intendant and wardens of the town of Columbia, in council assembled, that from and after the first day of November next, no person or persons shall permit or suffer, his, her or their goats or swine to run at large within the limits of the town of Columbia; and it shall be the duty of the chief marshal, and he is hereby authorized and required, to employ persons to seize and secure every and all such goats and swine so running at large; and he is further authorized and required, upon such taking and seizure, to impound the same in the lot adjoining the guard-house.

And be it further ordained, That upon impounding any such goat or swine, the marshal shall immediately advertise the same at the market-house in Columbia, giving a full and corresponding description thereof.

Should the owner or owners appear within two days thereafter, and offer satisfactory proof of and to said property, then the marshal is authorized and directed to deliver to him, her or them, the same, upon the payment of two dollars as a

swine from running at large within the limits of the town of Columbia, seized, impounded, and sold the hog.

The only question was, whether the hog was liable to seizure. I thought it was not. The ordinance can only have effect upon the inhabitants living within the corporate limits. The plaintiff living without the same, can in no way be effected by it.

A decree of thirteen dollars, was given for the plaintiff.

The defendant appeals and moves to reverse the Circuit decree, on the ground that the hog was liable to seizure under the ordinance.

M. Gregg, for the motion, contended that the town council, by their charter, have possession of the property of strangers in the town, as well as of the citizens. [*324 He cited 3 Faust, 65, or Act of 1805; *Tuadon* vs. *Eastwick*, 1 Salk. 192; *Butchers' Comp.* vs. *Morey*, 1 H. Black. Rep. 370; *Perse* vs. *Parker*, 1 Cowp. Rep. 269.

The object that the Legislature had, in incorporating the town of Columbia, will be found in the preamble to the Act, in 8th vol. Stat. at Large, 235.

Cited Digest of Town Ordinances, p. 27, also 35. He also contended, that if the view of this case, taken by the Circuit Court, be sustained, the ordinance embraced in this case, and many other ordinances, would be nugatory, and the power would be incomplete.

McCrary vs. *O'Cain*, 3d vol. of Appeal Rec.

He contended further that the by-laws of the corporation are binding upon all persons who come within their jurisdiction.

Wm. M. Myers, contra, contended that a preamble to an Act is not necessarily a part of the Act, and he would not consent to a case being made out by supposition.

Hogs were the best of scavengers, and do their duty better than all the marshals the town has ever had. [*325

The streets are public highways, and every man has a right to them. It is an ancient common law right, that no man can divest them of.

The metes and bounds of the town are ideal; there are no fences or walls to obstruct them.

Unless the corporation could maintain the action of *quare clausum fregit*, against every man or his horse, for stepping over these ideal bounds, this question is at rest.

Corporations arrogate to themselves powers that never were ceded to them. He cited, on corporations, Angel & Ames, 199; 1 Dane's Abr. chap. 2; Kent's Abr. 106.

Curia, per EVANS, J It is not controverted, but that the defendant

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fine, hereby imposed upon the owner or owners of every goat or swine which may be so found running at large, and so impounded as aforesaid.

And be it further ordained, That should no owner appear within the time hereinbefore designated, to wit, within two days, or appearing, shall fail or refuse to pay the fine hereby imposed, then it shall be lawful, and it is hereby made the duty of the marshal, to expose to public sale, each and every goat or swine, taken up and impounded as aforesaid, for the satisfaction of the said fine. And whenever any sale, made by virtue of this ordinance, shall produce a sum exceeding the said fine, the excess or surplus shall be deposited to the credit of the Town Council, to be given to the owner of the property so sold, upon the same being demanded within thirty days after such sale.

And be it further ordained, That all ordinances and parts of ordinances in any wise repugnant to or contrary to this ordinance be, and the same is hereby repealed.

Ratified in Council assembled, this 9th day of September, A. D. 1839.

(Signed) ROB. W. GIBBES, *Intendant.*

By the Intendant,

(Signed) J. D. TRADEWELL, *Clerk of Council.*

acted in pursuance of the ordinance of the town council, and the only question is, whether the council, by ordinance, could delegate to the defendant authority to seize the hog of the plaintiff, who was not a citizen of the town. I presume it will not be denied that the Legislature could pass a law requiring every man to keep his hogs within his own enclosures, and if he allowed them to stray at large, to authorize the seizure and sale of them. Previous to the Act of 1783,(a) incorporating the city of Charleston, we find many acts of the Legislature for the government of that city, similar to the ordinance under which the defendant sets up his justification. It would not be competent for the Legislature to delegate general powers of legislation to any other body than itself; yet, it has not been doubted, but that it may delegate to the corporate towns, a limited species of legislation, confined to their corporate limits, and in strict subordination to the constitution and general laws of the land.

The ordinance, in substance, prohibits all persons from suffering or permitting their hogs to run at large within the limits of the town, and requires the marshals to seize and impound all such hogs.

It further directs the marshal to advertise, after impounding, and if the owner appears and proves his property, it shall be delivered to him, on his paying two dollars as a fine; and in the event that no owner appears to claim the property, or appearing, shall fail or refuse to pay the fine, *326] then the hogs shall be *sold, and the excess above the fine shall be paid to the owner, if demanded within thirty days after the sale.

By the Act of 1805, (8 Stat. 235,) incorporating the town of Columbia, the town council are authorized "to make such ordinances, rules and regulations, relative to the streets and markets of said town, as they may think proper and necessary; and may establish such by-laws as may tend to preserve the quiet, peace, safety, and good order of the inhabitants thereof; and they may fix and impose fines and penalties for the violation thereof, which may be recovered in a summary way, by the intendant and wardens, or a majority of them." Similar provisions, but not in the same words, are to be found in the charters of the other incorporated towns, all of which are to be found in the seventh and eighth volumes of the Statutes at Large. The powers thus granted to the town council are, I apprehend, sufficient authority to make any public regulations which, in their judgment, may be necessary to prevent nuisances, by restraining hogs and goats from running at large, the accumulation of filth, and the butchering of hogs or cattle within the town; for the regulation of disorderly negroes, and the riding or driving of horses in the streets; upon all which subjects it appears they have legislated.

Indeed, without some regulations on these subjects, the good order, quiet, peace, and safety of the inhabitants could not be preserved. So obviously are these subjects within the legislative power of the council, that it has not been contended the ordinance would not operate upon the hogs of a citizen of the town. But it is supposed that the power of the council is restricted to those who reside within the limits of the corporation, and as the plaintiff is a non-resident, his hogs are privileged to run at large, whilst the hogs of a townsman have no such privilege. Let

(a) 7 Stat. 97. *An.*

us see if there be any thing in this objection. The power granted, is restricted to the limits of the town, but within those limits no distinction is made by the Act of Incorporation between citizens and non-residents, or their property; and it is clear that unless they come within the controlling power of the town authorities, when found within its limits, the power would be of but little avail in the attainment of the objects for which it was granted. Nothing can be more dangerous to the safety of persons passing along the streets, than the running of horses, and yet if the law of *the town council, on that subject, be obligatory only on the residents of the town, this plaintiff, or any one resident [*327 beyond boundary street, might make a race path of the streets of Columbia. The laws passed by the council, for the government of slaves, would be of but little value, if the numerous negroes who reside in the vicinity could violate them with impunity. But the arguments deduced from expediency and inconvenience, do not stand unsupported by the authority of the common law. The case of *Price* vs. *Bartrain*, (Cowp. 269,) was an action to recover a penalty for slaughtering two oxen within the city of Exeter, contrary to a by-law made by the Mayor and Common Council, under a general power given them by charter. Lord Mansfield said, "As to the objection that the defendant was a stranger, what my brother Glynn has said, is a complete answer to it; namely, that he is an inhabitant *pro hoc vice*, and consequently is bound by the same requisition as the other members of the corporation. Therefore, I am of opinion the by-law is good." The other Judges concurred. In that case the defendant had notice of the by-law, but was not free of the corporation, and, therefore, not a member of it. The same principle is to be collected from the case of the *Butchers' Company* vs. *Morey*, (1 Bla. 370.) These cases clearly establish, that if a stranger violate a by-law of a corporation, within its limits, having knowledge of the by-law, he is as liable as if he resided within the corporate limits. But it is supposed a difference exists between such a case and the one under consideration. I am at a loss to conceive in what the difference consists. The evil to be remedied is as great in the one case as the other. If a non-resident is bound to the observance of a known by-law, as well as a resident, I do not perceive why the hogs of the one shall be exempt, and not the other.

It was said in the arguments that every man has a right to turn his hogs on any unenclosed grounds. How far this may be true, it is not necessary now to discuss. No one will doubt that this right may be abridged by legislation, and that laws may be passed to limit or restrain it altogether. A law similar to the ordinance now in question, was passed by the Legislature, in relation to the City of Charleston, before the incorporation of that city; and if this liberty of hog range may be abridged by the Legislature, it may be abridged by the City Council of *Charleston, or the Intendant and Wardens of Columbia, or any other body to whom the Legislature have delegated the authority. [*328 The only case like the present which has been decided in our Courts, of which I have any knowledge, is the case of *McRa* vs. *Olain*, among the unpublished decisions of this Court. In that case, the Council of Camden, by ordinance, declared, "that it shall not be lawful to permit hogs to run at large within the limits of the town of Camden, and it shall be the duty of the town marshal, and he is required, to kill and destroy every hog

which may be found running at large within the limits of the said town, and may apply the hogs so killed to his own use;" with a *proviso*, that it shall not extend to such as are usually kept without the limits, and may happen to stray into the town. Under this ordinance, the defendant seized and sold the plaintiff's hog, and for this the action was brought. The case in this Court turned upon the question, whether the ordinance was in pursuance of the power granted by the charter. By reference to the Act incorporating the town of Camden, (8 Stat. 220,) it appears that the only mode of enforcing the by-laws of the corporation, was by fine, and it was held that an ordinance authorizing the marshal to kill and appropriate the hog to his own use, was not in pursuance of an authority to enforce the by-laws of the corporation by fine. No such objection arises here. The Act of Incorporation of the town of Columbia gives the power to pass by-laws, and to fix and impose fines and penalties for the violation thereof. The ordinance under which the defendant in this case justifies, imposes a fine of two dollars, and directs the seizure, impounding and sale of the hog, to raise the fine; and it is the opinion of this Court, that the ordinance was a legal justification to the defendant for the seizure of the hog, and the motion is therefore granted.

The whole Court concurred.

See 6 Rich. 415, 558; 1 Rich. 390; 2 Sp. 761; 2 McM. 233. *An.*

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*329] *JOHN HOGG *vs.* J. G. GILL.

A right of way, by prescription, implies an adverse use of the way for twenty years; and the party using the way, must use it as though he was exercising a right of property in himself, uncontrollable by the owner of the soil over which it runs.

Before BUTLER, J., at York, Spring Term, 1841.

This was an action on the case, to try the right of way. The plaintiff claimed by prescription, and declared for a way from his residence to the Pinkney or Blairsville road. For a short distance, the road was through plaintiff's land, who claimed under one Miller, whose daughter he married; and thence through defendant's land, to the Blairsville road. In 1815, Miller bought the land on which plaintiff resides, from James Gill. The land adjacent to it then belonged to defendant or his father, and the residue of the land on which the way run, belonged to Thomas Hogg, the father of plaintiff. At the time Miller settled, there was a winding bridle way through the above tract of land, leading to Blairsville. For the purpose of hauling his cotton to Blair's gin, Miller cleared out the way in 1816; and after that time, he and the neighbors used it indifferently, in going part of the way to church and to the mill, as well as to the gin. The road to Harmony church, turned off not far from Miller's house; some persons travelled it the whole distance, in coming to Miller's mill, and Miller used it occasionally in going from his house to other mills. There was no evidence that the road had been worked

on by any one in particular, after it was first cleared out by Miller. It was called the Miller road. In 1823, the defendant bought Thomas Hogg's land, which made him, as before stated, owner of all the land lying between plaintiff and the Blairsville road. About the time he purchased from Hogg, defendant cleared a field across the way, which was about seventeen years before this action was brought. When he put up his fence, he cleared out a road around his field. Some of the witnesses said he cleared out the way only to where his own road struck the field; others say that he cleared out a way round the field towards Miller's. Upon this point, the testimony was irreconcilable. There was no objection made by Miller, at the time the field was cleared, that his way would be obstructed, nor *was there any evidence that [*330 the defendant had consulted him on the subject. About two years before this action was brought, the defendant run two fences across the road, and cut a ditch. Before he cut the ditch, he put up a gate next to Miller's, on the line, about a hundred yards, at a right angle to the way. This he did for his own convenience in passing to his own plantation, and to accommodate the neighbors. The plaintiff objected to the gate, insisting that the old way should be opened, or a gate put on that. Defendant then asserted his right, by putting a ditch across the way; and this action was brought. The plaintiff and those under whom he claimed, as well as others, have been using the way for more than twenty years, and the question was, whether they have used it under such circumstances as to give the plaintiff a right by prescription. I charged the jury that as a right by prescription was founded on the presumption of a grant, the use of the way must be adverse; that is, that the party claiming it, should enjoy it as though he had a right to do so under a grant, or at least in a way that would be consistent with the presumption of a grant. That if it appeared from the manner of the use, that the way was enjoyed by the sufferance and permission of the owner of the soil, or that the party claiming the way acknowledged by any concession the right to obstruct it, then the right by prescriptive use could not be acquired. I further said, that a neighborhood path, running entirely through woodland, as this did, should generally be regarded as a mere convenience to the neighbors indifferently. But that, nevertheless, a way might be acquired through forest land by prescription, when the claimant exercised such a control as to indicate a right to it. In the course of my remarks to the jury, I said that the presumption of right by prescriptive use, arising from a grant, would be lessened from the fact that many persons travelled the way indifferently, and that it passed over several distinct grants; and that it would be increased when the way was used by one, and passed over one entire grant.

The jury found for the defendant.

GROUNDS OF APPEAL.

1. Because the case made by the evidence, clearly gave the plaintiff his right of way, as claimed.

*2. Because his Honor erred, in saying to the jury, in his charge, [*331 that if they came to the conclusion that Hugh Miller used the way only by permission, that would be fatal to plaintiff's right.

3. Because his Honor erred, in saying to the jury that others using the way, was a presumption against Hugh Miller under whom plaintiff claimed.

4. Because the Court charged the jury that it was fatal to the plaintiff's right to recover, if they believed that Gill did not open a way for Miller round his first field he cleared on the line of the old way; when that was only a slight change; and even if Hugh Miller had opened the way himself, and was thereby entitled to enjoy his right of way over the other, and main part of the road, this could not effect his, the defendant's, right by prescription.

Curia, per BUTLER, J. The grounds of appeal in this case would go to question the authority of the case of *Sims* vs. *Davis*, (Cheves' Rep. 1.) The well considered judgment in that case received my entire approbation and concurrence when it was pronounced, and instead of my confidence in the soundness of its views being diminished, it has been confirmed by trial and examination. My instructions to the jury, in the case under consideration, were in conformity with, and but illustrative of the general principles which that decision maintains. I held that a right of way, by prescription, implies an adverse use of it for twenty years, and is founded on the presumption of a grant in its origin. The party using the way must do so, as though he was exercising a right of property in himself, uncontrollable by the owner of the soil over which it runs. A supposition of right is irreconcilable with such circumstances as would indicate a recognized permission of the owner, or an acquiescence in the right to stop the way at his pleasure. When lands are enclosed, or otherwise specifically appropriated, any encroachment on them will be soon known and promptly resisted. A way could not be well used over such lands, without the knowledge of their owners; and when it has been respected and preserved for twenty years, its right is in some degree conceded—at least, the use for such a length of time, of such a way, might be regarded as adverse, and sufficient to presume a grant. On the contrary, where the way *runs entirely through wild and unappropriated forest, no such presumption could naturally arise. The owner of the land might not know of the existence of the way, or having no immediate use for the land, might have no inducement to oppose the use of it. His acquiescence, in such case, is founded on the assumption of all concerned, that he can appropriate the land whenever he might think proper to do so. Persons travel and use such a way under an implied, but revocable license, and regard it a mere convenience to be enjoyed at sufferance, without ever thinking of a right in themselves.

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These views authorize this conclusion, that the use of a way for twenty years, through enclosed ground, implies that it is adverse; but when it runs entirely through unappropriated forest it is merely permissive. In the first, there is a presumption of a grant which cannot be resisted but by proof to rebut it; in the other, this presumption does not exist, but by some evidence to raise it. On the trial of this case, by way of illustrating my views to the jury, I said that a presumption of a right of way by prescription was diminished by the fact that many, under the same circumstances, travelled the way, and that it passed over several tracts of land owned by different proprietors—for in such a case, many contracts would have to be presumed. Minors might, peradventure, own some, and as their lands could not be taken from them, by twenty years possession, acquired during their minority, no one could acquire a right of way, in them, under such circumstances. The exception taken to

these remarks, (for they can only be regarded as remarks,) can avail the appellant nothing. The case authorized them, and they served but as illustrations of the views of the presiding Judge, in his instructions to the jury.

We think the facts of this case fully sustain the verdict of the jury. The way claimed, seemed to have been turned and changed by defendant whenever he had occasion to clear his land. It had lost its identity by the repeated acts of defendant, without any assertion of right at the time, on the part of the plaintiff, or those under whom he claims.

The motion is dismissed.

The whole Court concurred.

Thompson and *Smith*, for the motion. *G. Williams*, contra.

See Supra, 49, and cases there cited in note. *An.*

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*SALLY BUGG *vs.* H. SUMMER, Adm'r. [*333

Where there is a plaintiff who can sue, and a defendant who can be sued, the Statute of Limitations begins to run.

The Statute of Limitations is not suspended during the time that elapses between the death of an administrator and the administration *de bonis non.*

Before EVANS, J., at Newberry, Spring Term, 1841.

This was an action on an account for work and labor. Sally and Sam Bugg were free persons of color, and brother and sister. They lived and worked together. Both were industrious, and the surplus of their gains, after paying expenses, was employed by Sam in the purchase of some property. In 1835, Sam made some declarations which might admit of the construction that he was liable to pay her for her services. He died soon after, in February of the same year. Letters of administration were granted to Ramage, in March, 1835. He died about two years after. Administration *de bonis non* was granted to defendant, 15th January, 1840. This action was commenced 29th January, 1840. The question submitted was, whether the demand was barred by the statute of limitations. From the death of Sam, to the beginning of this suit, was nearly five years, so that if there had been but one administration, the action was barred, and the only question was, whether nine months is to be added to the four years for each administration. This could not well be, when the writ in this case was issued fourteen days after the grant of the second administration, and because the debt was actually barred before the second administration was taken out. The plaintiff was nonsuited.

The plaintiff appeals, and moves the Court to set aside the nonsuit, on the ground, that the statute of limitations did not run during the time there was no administration on the estate of the defendant's intestate.

Heller, for the motion, *Fair*, contra, submitted the case without argument.

Curia, per EVANS, J. The Court concurs with the Circuit Judge. Whenever there is a plaintiff who can sue, and a defendant* who can be sued, the statute of limitations begins to run. A right of [*334

action has accrued to the plaintiff.(*a*) The general rule is, that if the statute begins to runs, it is not suspended by any subsequent event.(*b*) The only exceptions which I recollect, are infant owners of land, under the Act of 1824, (6 Stat., 238, § 7,)(*c*) executors and administrators, who cannot be sued until nine months have expired, and the case of war between the nations to which the plaintiff and defendant respectively belong.(*d*) Without inquiring whether the plaintiff might not have sued Sam Bugg in his lifetime, there could be no doubt she could have sued Ramage, his administrator, after the expiration of nine months from the date of his administration, in March, 1835. The plaintiff's action would have been barred, if Ramage had lived, in four years and nine months from March, 1835, which could not extend beyond December, 1839, unless by the death of Ramage the statute was suspended until administration was granted to the defendant. This would be against all the authorities. In the case of *McCullough* vs. *Speed*, (3 McCord, 455,) the statute commenced to run against McCullough, in his lifetime. Sometime elapsed between his death and the granting of administration to the plaintiff. If this time was deducted, the debt was not barred. But it was decided that as the statute commenced to run against McCullough, it was not suspended by the fact that after his death some time elapsed before administration was granted. This case must be governed by the same principle, and the motion is dismissed.

RICHARDSON, O'NEALL, and BUTLER, JJ., concurred.

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*335] *B. H. RAGSDALE *vs.* C. L. THORN.

Upon the plea of "*non est factum*" solely, a defendant cannot go into evidence of the failure of the consideration. He must give notice to the plaintiff of such matter. *Vide Bolinger* vs. *Thurston*, 2 Mills, Const. Rep. 447; and 1 Hill, 370.

Wilful misrepresentation, or any other matter which will go to show that a bond, note, or other instrument, was void in its creation, may be given in evidence under the general issue.

Before EARLE, J., at Chester, Fall Term, 1840.

Debt on sealed note given for a piece of land, purchased by the defendant of the plaintiff. The defendant, under the general issue, and without notice of discount, offered to prove and was prepared to prove, that the plaintiff, when he contracted to sell the land to the defendant, represented the boundary on one side, as extending to the road, a public highway, near which it was admitted to be situated; that it intersected the road, or extended to it as a boundary; whereas, in fact, this was untrue, and the land of another intervenes between that purchased, and the public road, whereby the defendant is excluded from it; that this materially affects the same, as the defendant's object was to set a retail shop on the road.

(*a*) 3 M'C. 452; 2 Mi. C. R. 269; 2 M'C. 151. *An.*

(*b*) 4 Rich. 619; Act of 1824; 3 Bur. 438, 153; 3 M'C. 451, overruling 1 M'C. 139; 2 N. & McC. 296. *An.*

(*c*) 1 N. & McC. 334; 4 M'C. 422. *An.* (*d*) *Robson* vs. *Wall*, 2 N. & McC. 498. *An.*

On the state of the pleadings, I overruled the defence, and instructed the jury to find for the plaintiff. The defendant, at the last term, obtained leave to file a special plea, which he had omitted to do, and after the trial was entered upon I refused leave to put in the plea.

GROUNDS OF APPEAL.

1. Because defendant should have been allowed the benefit of defence under the general issue, as the defence went to the whole of plaintiff's demand, and showed defendant did not receive any consideration for the note sued on, which had been obtained by misrepresentations of plaintiff on the subject of the land for which the note was given.

2. Because the defendant should have been permitted to put in the special plea, if necessary, as the same was not done on account of the sickness of defendant's counsel, and plaintiff had notice of the plea at the last spring term.

*3. Because the verdict is not according to law and evidence. [*336

Thompson & Eaves, for the motion, cited 2 Hill, 656–7, *Brickell* ads. *Means*. Where an instrument is obtained by fraud, the party should have a right to offer his defence in any way, and should not be required to plead specially, when the other party is not taken by surprise.

The case should have been submitted by the Court to the jury, to inquire into the fact, whether it was obtained by fraud or not.

M. Williams, contra. Defendant cannot give in evidence any misrepresentations of plaintiff, unless the same be specially pleaded.

Cited *Means* vs. *Brickell*, 2 Hill, 656–7; 1 Bay Rep. 278; 2 Const. Rep. 447; 1 N. & M'C. 78.

Thompson, in reply, commented at length, and with great ability, on the case from 1 Bay, 278. He also contended that the defect in the pleadings arose from the indisposition for a long time of Major Eaves, and on that account desired the case to be sent back.

Curia, per O'NEALL, J. We agree with the presiding judge below, that on the state of the pleadings, the defence could not be sustained. The rule is very clearly stated in *Bollinger* vs. *Thurston*, (2 Mill's Con. Rep. 447,) that upon the plea of *non est factum*, solely, the defendant cannot go into evidence of the failure of the consideration; he must give notice to the plaintiff of such matter. In *Hunter* vs. *Graham*, (1 Hill, 370,) the subject was again considered and the rule reiterated. The Act to regulate the practice of the Courts of law,(*a*) in certain cases, (Acts of '31, p. 46,) which provides "that in all actions of debt on bond, the defendant shall be at liberty, under the plea of the general issue, to offer in evidence any matter tending to show that the bond was void in its creation, provided twelve days' notice be given to the opposite party of the nature of the defence intended to be relied on," would seem to impliedly sanction the doctrine, that no defence which admitted the execution of the bond, could be given in evidence under the general issue, before its passage, [*337 *and only by giving notice since. But the second clause of the Act reserves the right which might then exist according to the laws and usages of this State, of giving any matter in evidence under the general issue. Putting the two clauses together, I suppose the Act was intended to solve what was thought to be a doubtful question of practice; and it would be well now, perhaps, to conform, in practice, generally to its provisions. Still, however, I have no doubt that any matter which shows

(*a*) 6 Stat. 438. *An.*

that the bond was void in its creation, may be given in evidence under the general issue.(*a*) If, as the defendant's counsel supposed, it had been shown that the single bill in this case, had been obtained by fraud, I should have entained no doubt that that defence was available under the general issue. But misrepresentation is not necessarily fraudulent.(*b*) Wilful misrepresentation must be so. But a mistake or ignorance may cause a misrepresentation that would not be such a fraud as to render an instrument void. On the present occasion, the *scienter* has not been brought home to the plaintiff, and hence there can be no doubt in saying that the single bill was not void in its creation, and that the defendant's defence was a partial or entire failure of consideration, neither of which defences could avail him under the plea of *non est factum*.

The second ground of the defendant's motion cannot help him here. The matter alluded to in it, was addressed to the discretion of the Judge below. That it was properly exercised, we would not lightly question. On this occasion, however, there is no doubt that the defendant had no right to ask further indulgence. At a previous term he had been allowed several months to file the plea. During all that time, with the exception of perhaps one day, his counsel was well. If that which ought to have been done, was not done, to what cause is it to be ascribed? Certainly not to the act of God. The untiring industry and zeal of the junior counsel for the defendant negatives the notion that the non-filing of the plea arose from his neglect. It was, I presume, not done, because upon reflection it was not supposed to be necessary.

The motion is dismissed.

The whole Court concurred.

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*338] *THE STATE *vs.* ELIJAH DERRICK.

Two indictments may be sustained under the Act of 1839, against the putative father of two bastard children, born at one birth; but the indictments and the recognizances should describe each child by name and complexion, hair and sex, or by some means of separate identity.

The Act of 1839, is a repeal of the Act of 1795, on the subject of bastardy.

Before EVANS, J., at Lexington, Spring Term, 1841.

This was an indictment for bastardy. It appeared that one Mary Stuck had been delivered of two bastard children at one birth, and charged the defendant as the father. There were separate indictments for each. Defendant was tried and convicted on the first, and then pleaded that in bar of this, to which there was a demurrer. The Act of 1795 contains a provision in case there are two children born at a birth. By that Act, the indictment should be for both. The Act of 1839 contains no such provision, and the Solicitor thought himself bound to indict for each separately, under the latter Act. There are many reasons why the indictment should include both, and I do not perceive any such inconsistency between the two, as to suppose the latter was a

(*a*) See 4 Rich. 507. *An.* (*b*) See 2 Hill, 657. *An.*

repeal of the former. Without having any clear or distinct opinion on the question, I sustained the plea by overruling the demurrer.

GROUNDS OF APPEAL.

1. Because an indictment cannot be sustained under the Act of 1795, for two bastard children (born at a birth,) since the Act of 1839.

2. Because a separate indictment will lie against the putative father for each bastard child, (whether there be one, two, or more, at a birth,) that has been born since the act of 1839, and therefore the defendant's plea ought to have been overruled, and the demurrer should have been sustained.

Caldwell, Solicitor, for the motion, cited 2 Stat. at Large, 224, and contended that it was a separate cause of action.

A. A. 1795, 2 F. 94. Under this Act, where a woman was delivered of two bastard children, the putative father shall enter into bond for £120, and be sold only for four years.

*A. A. 1839, 16. Material difference between this and the Act of 1795. The penalty was increased from £5 to £25 per annum. [*339

Does the Act of 1839 repeal the Act of 1795?

The Act of 1839 is a revision of the Bastardy Law.(*a*)

See the Blue Book, p. 79.

Cited Miller's case; 1 W. B. Rep. 451. *Rex* vs. *Caper*, 4 Burr. 2026; 2 Leach, Cases, 228; 2 H. B. Rep. 620.

Can an indictment contain two counts for distinct and separate offences?

Boozer, contra, said the indictments were transcripts of each other, both male children.

Cited 5 Cooper's Stat. 270; 1 B. Con. 81; 6 Bac. Abr. 373; *id.* 382.

Mr. B. said this was as to the defendant, an *ex post facto law*—that the children were got, although not born, before the passage of the Act of 1839.

Curia, per O'Neall, J. That the Act of '39 is a repeal of the Act of '95, is fully shown by a reference to the rules stated on that subject, in the case of *Righton* vs. *Wood*, (Dud. Law Rep. 164;) Act of '39, 16; 5 Stat. at Large, 270.

The single fact, that the penalty of the last Act is a greater one than that imposed by the former, makes it impossible that the two should stand together as cumulative, or to be construed in *pari materia*. The same offence cannot at the same time be subject to two different punishments. The fact that this would be the case if two statutes were considered to be of force, shows the maxim, "*leges posteriores priores abrogant*," must have effect.

The case of *The State* vs. *Ben. Evans*, (3 Hill, 190,) is an instance of the application of this principle. The defendant was indicted under the Act of 1817, for trading with a slave without a written ticket from his master or employer, by selling to him spirituous liquors. The Act of 1834 subjects any one who shall sell, exchange, give or deliver spirituous liquors to a slave, without a written ticket, to a less penalty than is prescribed by the Act of 1817. It appeared that the defendant was a shopkeeper, and vender and retailer of spirituous liquors. It was held that the Act of 1834 *was a repeal of the Act of 1817, as to the offence of which the defendant was guilty. [*340

The Act of '39 increases the penalty to be paid by the father of a bastard child, from £60 to £70. This is in itself a repeal of the former statute, unless the Act of '39 does not cover the case where "a white

(*a*) 11 Stat. 16, § 12. *An.*

woman shall be delivered of two or more bastard children." If it does not, it cannot repeal the Act of '95, which in terms provides for the case, "if any white woman be delivered of a bastard child or children."

I think, however, that the Act of '39 will, on a fair construction, provide for the same state of things. (Acts of 1839, p. 16.) The words of the Act are "if any white woman be delivered of a bastard child." These words embrace the birth of one or more children. For as to each the mother is delivered of a bastard child, and the maintenance of a bastard child is the object sought to be provided for. The person to be proceeded against for the penalty, is described in the Act to be "the father of her child." If there are more than one, he may fulfil that description as to each, as well as to a single one. If it should so happen, that where two or more children are born together, that they should be the offspring of different fathers, then, under the words of this Act, each father may be indicted. Under the Act of '95, it would be very doubtful whether that could be done; and that doubt, I presume, led the Legislature of '39, to drop the words "children," as unnecessary. The object of the recognizance, directed to be entered into, is to secure the penalty "for the maintenance of the child." The words may as well mean each child, when there are more than one, as a single child. The only difference between the two Acts, in this respect, is, that in the former Act, the children born together are to be considered as one offence, for which the father answered jointly, but was subjected to the penalty of £60 for each child. In this Act, the birth of each child is considered as the offence for which the father is to answer, and the penalty is to be secured separately for the maintenance of each.

In the argument here, it was suggested that as to this defendant, this Act ought to be regarded as *ex post facto*, as the children were begotten before its passage. But the offence, according to the plain words of the Act, is, "if any white woman be delivered of a bastard child," then the *341] father shall be *proceeded against for the maintenance. Unquestionably the act,(a) however immoral, is not noticed or regarded as criminal until the delivery. That makes the offence as to the father, and not anything which preceded it.

It is said that this indictment is an exact transcript of that on which a conviction has taken place, and hence that that conviction must be a bar to this indictment. This would *prima facie* appear to be true; but yet like all other *prima facie* showings, it may be obviated. To sustain the plea of "*autrefois convict*," the crime must be the same for which the defendant was before convicted, 1 Chit. C. L. 461. To such a plea the solicitor might, as to a plea of *autrefois acquit*, reply and take issue upon the averments of identity. (*Ib.* 460, 464.) Under these authorities the solicitor may reply to the plea of *autrefois convict*, that the mother was delivered of two children, and that the former indictment and conviction was for one of them, and this indictment is for the other. In such replication, more certainty is necessary than in the indictment, and therefore in it the children should be distinguished by name, complexion, hair and sex, or at least by some of these marks of separate identity. I perceive that the solicitor demurred to the plea, and if we were, therefore,

(a) 7 Rich. 365; 10 Rich. 366. *An.*

strictly to regard the pleadings, we should be obliged to sustain the decision of the judge below. For there is nothing on the indictment which shows that this indictment is for an offence different from that set out in the former indictment; but as the case here was argued upon its merits, and as the object is to settle a doubtful question of practice under a recent Act of the Legislature, and not to obtain an advantage by pleading, the case has been and will be considered as if the proper fact had been replied to avoid the plea.

It was argued that separate recognizances could not be so framed as to provide certainly for the maintenance of each child. The difficulty in this case will be avoided by distinguishing the children in the replication, and in the recognizances which may be hereafter taken, if the defendant should be convicted. In all future cases, the indictments and recognizances should distinguish each child by name, complexion, hair and sex, or by some of these means of separate identity.

The motion to reverse the decision below is granted, and the solicitor has leave to withdraw his demurrer, and to reply to the plea of *autrefois convict.*

The whole Court concurred.

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*NATHANIEL GIST, *et al. vs.* ABRAHAM MCJUNKIN, *et al.* [*342

The sheriff sold a tract of land under execution, which was purchased by a third person, against whom the owner subsequently filed a bill in Chancery, to set aside the sale on the ground that the execution was satisfied. The Chancellor, upon examining the case, thought the fact of satisfaction was proved, and that the purchase showed it; he, however, referred it to the commissioner, to inquire as to that fact, and decreed, if found for the complainant, that the sale and deed should be set aside; otherwise, that it should stand. Subsequently, the parties compromised, and the purchaser's money and costs were refunded, and he, by the direction of the owner, J. T. McJunkin, conveyed the land to J. A. McJunkin. It was *held,*

That the Chancellor's decree was provisional.

That the sheriff's sale and deed still subsisted.

That the legal title was still in the alienee of J. A. McJunkin.

That a sheriff's sale under an execution purporting to be satisfied, when the sheriff has in his office, at the time of the sale, a subsisting execution, is not void; and the plaintiff in the subsisting execution is not entitled to have the land re-sold, but is only entitled to the proceeds arising out of the sale.

Before BUTLER, J., at Union, Extra Term, 1841.

This was an action of trespass to try titles. Both of the parties, plaintiff and defendant, claimed under John T. McJunkin, through sheriff's sale. *The evidence on the part of the plaintiff, in the first instance, was as follows:*

Records in the case of *Nathaniel Gist*, administrator of *Jas. Dugan*, vs. *Jno. T. McJunkin.* Judgment signed 28th April, 1837, for $1275; *fi. fa.* 1st May, 1837. Entry on *fi. fa.* by sheriff. Levied on four hundred acres of land, of J. T. McJunkin, more or less, whereon James McJunkin now lives. Deed from R. McBeth, sheriff, to plaintiff, dated 14th September, 1837. The deed describes the land, as bounded by Thomas Sorter and A. McJunkin, and others, and as the land whereon John T. McJunkin formerly lived. The foregoing proceedings and judgments were

instituted to revive a judgment obtained by James Dugan, in his life time, against J. T. McJunkin; *fi. fa.* dated October 16, 1826. The plaintiff here closed, having proved a trespass, and *defendants offered the following evidence* of title:

Records of *Ordinary* vs. *Jno. T. McJunkin.* Judgment dated 28th March, 1826, for $440; *fi. fa.* same day; levy of land in controversy, entered on *fi. fa.*, in April,
*343] 1826. *Deed from John Anderson, sheriff, conveying the land to William M. Thomson, in consideration of $84. Besides the above, another record of *Robert Malone* vs. *John T. McJunkin*, was introduced. Judgment, 12th April, 1833, for $150; entry of levy on the same land by sheriff; deed from sheriff, B. Johnson, to Abraham McJunkin, the defendant, dated 10th December, 1833, conveying three hundred and sixty-seven acres of land, more or less.

Evidence in reply:—Proceedings in Chancery, in the case of *John T. McJunkin* vs. *William M. Thomson* and *John Bates, sheriff.* The main object of this bill, was to set aside the sale to William M. Thomson, before mentioned, upon the ground, that the judgment under which the sale took place, had been satisfied before the sale. Chancellor Harper, at June Term, 1829, heard the case upon the bill and answer. By his decree, which was given in evidence, the Chancellor was satisfied from the evidence then before him, that the proceeds of property, sold under a *fi. fa.*, against John T. McJunkin, was applied to the payment of that judgment, and that if the application in fact had been made, the judgment was satisfied; but not having the *fi. fa.* before him, he did not make a final decision on the matter, but referred it to the commissioner, to report whether or not the judgment had been satisfied, and that upon the coming in of the report offering that fact, the judgment should be marked satisfied, and the sale to Thomson set aside, &c. But if it should appear, on the reference, that the judgment had not been satisfied, which was to be made appear by the defendant being the acting party, then the bill to be dismissed without cost. I have not the decree before me, but as it is important, it can be referred to. After the decree was pronounced, and when I supposed it was pretty well ascertained that the deed to Thomson would be consulted, the following arrangements were made by Thomson and two of the McJunkins, John T. & Jos. A.

William M. Thomson, who was sworn as a witness, gave this account of the transaction—that either he proposed to John T. McJunkin, or McJunkin made the proposal to him, that the money paid by Thomson, and the cost which he incurred, should be refunded to him, and that he should reconvey the land. For
*344] the purpose of securing to himself the *money thus to be refunded, he took a confession of judgment from Jos. A. McJunkin, (son of John T.) John T. McJunkin, and Benjamin McJunkin, for $117. Thereupon, John T. McJunkin presented, in his own handwriting, a paper purporting to be a conveyance of the land from Thomson to Jos. A. McJunkin, in consideration of $1500, with a clause of general warranty. The witness refused to sign the deed, but finally executed a deed of the land in John T.'s handwriting, containing the true consideration, and without clause of warranty to Jos. A. McJunkin. By a memorandum of the execution, it appears that the amount of confession was paid to Thomson by John T. McJunkin.

Joseph A. McJunkin, who had conveyed all his interest in the land to Abram, was sworn, and gave the following testimony:

That on the day the land was advertised to be sold, under the Malone judgment, he met with his uncle Abram, who said to him, I am afraid your title from Thomson is not good. I am willing to give you, for the benefit of your family, $1200 for the land, but I am afraid I cannot get good titles from you; you must forbid the sheriff's sale, and I will bid and take the titles from the sheriff. The witness said he agreed to this arrangement, and that when the land was offered for sale, he forbid the sale, saying, that whoever bought the land, would buy a lawsuit. The land was set down in the sheriff's books to John Rogers, but the titles was made to Abram McJunkin. The witness said that Abram never had paid him any thing for the land; he may have paid the amount of the Malone judgment, (about $150;) that judgment was recovered on a joint and several note, signed by his father and himself; that he was security on note; and that a separate judgment was recovered against each maker; the land was knocked off to Abram, or for him, at $10, (it appeared here, that the plaintiff had got the land

conveyed to him, on a bid of $16.) The witness said, that one Gregory had offered him $1200 for the land, if he would make him good titles. On his cross-examination he said, the money that was paid to William M. Thomson, was his own, although his father may have paid it. Benjamin Gregory said he was anxious to buy the land, and would have given $8 or $10 an acre; offered Jos. A. McJunkin $1200, if he would make good rights. On the day *the land was [*345
sold, under the Malone judgment, witness asked Abram about Jos. A.'s title. Abram said he did not think it good, and advised witness not to bid, or that he would involve himself if he did. No one bid at the sale but Rogers, and he made but one bid. The fact that the land was represented to be in dispute, made it sell for less than its true value; the land was valuable.

B. Johnson, the sheriff, said he advertised and sold the land, without any particular instructions from Malone. There was an endorsement on the execution to proceed forthwith, and he proceeded under this instruction and the execution itself.

L. B. Geter heard Abram McJunkin say, that the land had been bid off by John Rogers, but it was for himself.

Daniel Thomas said he came to the sale to bid for the land; regarded it valuable; that just as the sale was coming on, he inquired of Rogers whether there was any incumbrance on the land. Rogers replied, that any one who bought it, would buy a law suit.

This evidence was objected to on the part of the plaintiff, and admitted by me, on the ground, that the connection in the transaction, alleged to be fraudulent, between Abram McJunkin and Rogers, was abundantly proved.

Dr. Jeter said, that before the sale, he saw a good deal of intercourse between Abram McJunkin and Rogers; they seemed to be in constant conversation, &c. In going home after the sale, he and Abram and others in conversation, Abram said he was sorry he had bought the land. The witness said the land was worth from $10 to $15 an acre.

William Davis, heard the defendant say the same thing at another time.

Jos. A. McJunkin, recalled. About seven days after Malone's sale, he made a deed to Abram, in consideration of $1200; no part of which he has received.

There were several witnesses, who said they had often heard Abram McJunkin say, that the judgment of *Ordinary* vs. *John T. McJunkin*, was satisfied before the sale under it.

Evidence on the part of the defendant:—John Ward said, he saw a note given by Abram McJunkin, to Jos. A. McJunkin, for $600, which witness regarded as part payment of the land; saw it in John T. McJunkin's possession; saw Abram sign a note, to John T. McJunkin, for $200, for her dower.

* Mr. Kesler, said he was present when Jos. A. executed the deed to [*346
Abram. At the same time, Abram gave his note for $600, and paid some money, but how much, witness could not say. The evidence here closed.

Then, after full argument, the case was submitted to the jury. I held that Judge Harper's decree was not a final judgment, which, of itself, set aside the sale of Thomson. But the question was still open, whether John T. and Jos. A. McJunkin, by combination, have procured titles to be made by Thomson to Jos. A., at a less price than the real value of the land, with a view to defraud John T.'s creditors. This question was distinctly submitted to the jury, with a full explanation of all the circumstances which could effect either side. So of the sale under the Malone execution. This was a question of fact, which belonged to, and was submitted to, the jury.

What I have said embraces all the questions involved in the case or growing out of my charge. There is no foundation for second ground of appeal. I suffered the declarations of Abram McJunkin to be given in evidence, by witness sworn before me, and said, that although the decree of Chancellor Harper must be received, nevertheless, the evidence re-

cited in it, was not evidence received in this case. This, however, was unimportant, as the same evidence was given before me of Abram's declarations. I do not understand the meaning or reference of the fifth ground. I will not speak of all my omissions, but I say, that I never instructed the jury not to believe Jos. A. McJunkin; for, on the main points of his testimony, I thought he told the truth. The plaintiffs did not recover as much land as that described in the declaration, their verdict was for the land whereon John T. McJunkin lived, and they can take no more than that under a writ of *habere facias possessionem*, as it regards the rent. The proof was that defendants had been cultivating the land, about forty acres, for five years; and witness said, land would rent from $2 to $3 per acre. I cannot now say, what was the estimate of the jury; they found for the plaintiffs, the land and $300 damages. I was willing that the jury should have found less damages, as from Chancellor Harper's decree, it appears to me that the McJunkins had been hardly used, in a way that approached oppression; and as I said to the jury, I wish
347] they had pursued a proper mode to relieve themselves. Upon the whole, my sympathy was with defendants, but I submitted the case without prejudice to the jury.

The defendants appeal, on the following grounds.

GROUNDS OF APPEAL.

1. Because the title of William Thomson being legal and valid, he had a perfect right to give or convey the land to whom he pleased. And Joseph A. McJunkin, having paid his own money for the title of Thomson, had as perfect a right as Thomson. And the Court erred in charging the jury that they might find the conveyance from Thomson to Joseph A. McJunkin, fraudulent and void.

2. Because the Court permitted what the defendant, A. McJunkin, said in the case in Equity, of *J. T. McJunkin* vs. *Bates & Thomson*, to be given in evidence, to defeat the title of Thomson, and consequently, his own title, when, according to the decree in the case, the title was not set aside, and is yet good and valid, and the Court charging the jury upon this evidence against the defendants.

3. Because the purchase of A. McJunkin, under the Malone judgment, was good and valid, and the Court erred in charging that the acts of A. McJunkin and J. A. McJunkin, might be considered fraudulent, and vitiate the sale, when they had no agency in procuring the sale.

4. Because the Court permitted the declarations and advice of Mr. John Rogers, to be given in evidence against the defendants; and held, and took for granted, that Rogers was the agent of A. McJunkin at the time they were made.

5. Because the character of Joseph A. McJunkin was attacked by the testimony of two witnesses, and the evidence of his own deed; and the Court omitted charging the jury upon this part of the case, or to give them any instructions, and said witness was unworthy of belief.

6. Because the defendant, A. McJunkin, is a purchaser for a valuable consideration from J. A. McJunkin, without notice of any fraud between J. A. McJunkin, J. T. McJunkin, and William Thomson, if there was any.

7. Because the jury have not found the land sued for, nor the land described in the plaintiff's deed, and they have given damages for the rent or use of the land, anterior to the time when the plaintiffs acquired a title.

*348] *8. Because the plaintiff, having the oldest judgment, will recover the proceeds of the former sales, and obtain the land also.

9. Because the verdict is contrary to law and evidence.

Herndon, for the motion—on the first ground. Title of William M. Thomson. Is this title a good one? It is contended that this title is set aside by Chancellor Harper's decree, but by good authority, he hoped to show that it was not set aside.

It was not necessary for the defendants to go on and hold the reference under Chancellor Harper's decree, but it was the duty of the complainants to do so; the *onus* was on them.

The decree of the Chancellor in the bill in equity, was not final between the parties. There are two kinds of decrees in equity, final and interlocutory. And this decree will be found to be interlocutory.

It is immaterial as to the defence in this case, whether the title be in the defendant or in others; it is sufficient to divest the plaintiff of his right, to show a better right than his; one in another. *Harrison* vs. *Hollis*, 2 N. & McC. 578.

2d Ground. A purchaser for a valuable consideration has a good title, though the party from whom he purchased obtained his title by fraud. 10 John. 185. Also, S. P. Com. Law Rep. 35.

Dawkins, contra. The questions of law were decided by the Court in favor of the defendants, and the only questions left to the jury, were those of facts.

The question for the Court is, whether Thomson's deed was a valid one or not.

A man's declarations are admitted, upon the ground that he will swear nothing against himself.

3d Ground—12 Wendell Rep. 41.

Thomson, same side. We go entirely against the title of William M. Thomson, and declare, that by the Chancellor's decree, Thomson's title was completely nullified. Cited *McCool* vs. *McClarey*, Harp. Rep. 486.

*A. McJunkin was estopped by the Chancellor's decree, and any person attempting to commence an action, under Thomson's deed, would be liable [*349 to attachment for a contempt.

Thomson, though a defendant to the proceedings in Chancery, in this action his position is changed, and he becomes the actor. 1 Story Eq. 27 and 28; also, commented on the case, *Harrison* vs. *Hollis*, relied on by the opposite counsel.

Thomas & Ashby vs. *Jeter*. 1 Hill Rep. 380; 10 John. 223.

Herndon, in reply. Obliterate the title of Abraham and Jos. McJunkin, and still the title of Thomson is good, and these plaintiffs cannot recover.

The declarations of Abraham, since the sale, cannot effect the title of Thomson, and could not divest him of his rights.

There was no evidence on the trial of the cause on the circuit, to attack the validity of Thomson's deed.

If the titles of Joseph A. and Abraham are void, it does not vest the title in John T. McJunkin again, while Thomson's deed is good.

If the sale of the Sheriff, under the Ordinary's execution, to Thomson, is not good, the execution of Dugan was in his hands, and that is conceded to have been a good execution, and the recital of a void execution is no ground to effect a sale, when the Sheriff had a valid execution in his office. Cited 3 M'C. 261; *id.* 291, as to damages.

Curia, per O'NEALL, J. According to the view which I take of this case, the legal title to the land in dispute, is in the defendant, Abraham McJunkin, and the plaintiffs are not entitled to recover.

Chancellor Harper's decree, of June, 1829, in the case of *John T. McJunkin* vs. *John Bates & others*, was provisional merely. If, upon the coming in of the commissioner's report, it appeared that the execution of the *Ordinary* vs. *John T. McJunkin*, (under which his land had been sold and purchased by Thomson,) was satisfied, then the sale and the deed were to be set aside; but if the fact did not so appear, then the bill was to be dismissed. No one can pretend that such a decree could operate beyond its terms. Its effect depends upon a fact, not then, but

*350] afterwards to be, ascertained. *If that fact never was ascertained, it follows, that the decree can have no effect; so far as that case was concerned, none, save the parties before the Court had the right to complain, if the case rested at the point to which the decree reduced it. They chose, instead of pursuing the litigation, to compromise. The money paid by Thomson, on his purchase at the sheriff's sale, and the costs which he had incurred were secured to be paid to him, by the note of Joseph A. McJunkin, John T. McJunkin, and Benjamin McJunkin, and thereupon he, by the consent, and indeed by the direction of, John T. McJunkin, conveyed the land to his son, Joseph A. McJunkin.

The legal effect of this arrangement, was the same as that which would result from a discontinuance at law. It was a withdrawal of the case in equity, while something yet remained to be done, in order to ascertain and fix the rights of the parties.

This left the sheriff's sale and deed to Thomson, a subsisting and legal divestiture of the estate of John T. McJunkin. Until they are set aside for fraud proved, and not merely conjectured, we are bound to give them effect. In general, a debtor is the only one who can complain about a fraud committed on his right, by a sale under execution. Still, if he was a party consenting to a fraudulent sale of his property by the sheriff, his creditors might have relief against it. (*a*) The ground on which the deed to Thomson was assailed in equity, was, that the execution under which the sheriff sold, was satisfied. This, if true, and there was no other subsisting execution in the sheriff's office at the time the land was sold, would render the sale void; and it is possible, if the debtor did not think proper to question such a sale, that his creditors, having no other remedy, might avail themselves of the objection.

But certainly these plaintiffs do not occupy that position. The judgment under which they now claim was recovered on a judgment in favor of James Dugan against John T. McJunkin, on which there was an execution lodged in the sheriff's office, on the 16th October, 1826. The sheriff's sale to Thomson was subsequent; and hence the sale would be referred, if the ordinary's execution was satisfied, to Dugan's execution, and his judgment would be entitled to the proceeds of the sale, and not to a right to set up the satisfaction of the elder execution, and claim

*351] to re-sell the land. This, it seems *to me, leaves the plaintiffs without any ground on which to stand. For McJunkin's title being conveyed to Thomson, and they being so situated in the derivation of their title that they cannot set up the supposed satisfaction of the execution, under which the sheriff sold and conveyed, it would seem to follow that the sale to, and purchase by them, of the interest of John T. McJunkin, in the land, was the sale and purchase of nothing. But it is said that John T. McJunkin paid his son's note to Thomson. If this be so, still it can have no effect to re-vest in him a title to lands of which he had legally been divested. That could only be done by deed. If the whole arrangement between him and his son had been fully proved to be, that he should pay the money to Thomson, and that the son should hold the land for his use, the utmost which could be said of it would be that it was a use unexecuted by the statute, and remained, therefore, a mere trust in equity, which this Court could not notice. *Harrison* vs. *Hollis*, (2 N. & McC. 578.)

(*a*) 3 Rich. 119; 1 Rich. 21; 1 Hill, 415. *An.*

These views make it unnecessary to notice very particularly the subsequent matters in this case. For Joseph A. McJunkin having the legal estate in the land, could convey it to Abraham McJunkin, and his title would be only incumbered by the trust (if in fact there was any,) in favor of John T. McJunkin. He alone can avail himself of that. There could be no fraud on the rights of creditors in the sale under Malone's judgment. For John McJunkin had then no estate in the land. But upon the facts, I confess that I am unable to discover any fraud on the part of Abraham McJunkin. He told his nephew, on the day on which the land was sold under the Malone judgment, that he was afraid his title to the land was not good, but as he was willing to give him $1200 *for the benefit of his family*, he directed him to forbid the sale, and he would do so and take the sheriff's title. This was an indirect mode of legalizing a doubtful title, but still a valuable money consideration was to be paid, and was paid. For although he paid Joseph A. personally, nothing, yet he paid the Malone judgment, debt, interest, and costs, exceeding $200.

Wood proved notes given by Abraham, on account of the land, to the amount of $800; and Kesler proved that when the deed was executed by Joseph A. to Abraham, that a note of $600 was given by Abraham, and some money paid. *Taking all these facts together, I should infer that the consideration of the $1200 was fully paid; and this [*352 conclusion is much strengthened by the fact that John T. McJunkin lived upon the land some years after Abraham bought, and then removed to the West, leaving him in the sole possession and enjoyment. Neither he, nor Joseph A McJunkin, has, so far as we are informed, complained of any fraud upon them, as committed by Abraham McJunkin, and if the case stood alone upon the facts, I should be slow to conclude that the consideration of $1200 had not been paid. But upon the law, for the reasons which I have previously given, I am clear the plaintiffs are not entitled to the verdict which has been found for them.

The motion for a new trial is granted.

GANTT and RICHARDSON, JJ., concurred.

LAURA S. TAYLOR *vs.* JOHN MCLEAN.

One being the agent of another, drawing a promissory note, and signing it with his own name, thus, "Daniel McLean for John McLean," it was held, that it was the note of "Daniel McLean," the agent, and not the note of the principal.

Before O'NEALL, J., Richland, Spring Term, 1841.

This was an action of assumpsit on a note of hand, signed "Daniel McLean, for John McLean." It seems from the evidence, that Daniel McLean was the agent of John McLean. A motion was made for nonsuit, and sustained by the Court, on the authority of the case of *Fash* vs. *Ross*, (2 Hill, 294.)

The plaintiff moved the Appeal Court to set aside the nonsuit, on the ground that Daniel McLean, who signed the note thus "Daniel Mc-

Lean, for John McLean," was proved to be the agent of John McLean, authorized to make such note. and *to purchase provisions for his stage line, and that John McLean was bound by his signature.

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W. F. De Saussure, for the motion, cited *Fash* vs. *Ross*.

An agent may make himself liable for his principal, but the principal is liable for his agent's acts. Cited Riley's L. Cases, 78, *Waddell* vs. *Mordecai; Prior* vs. *Colter*, 1 Bail. 517; 2 Bail. 55, *Allen* vs. *Brazier;* 11 Mass. T. Rep. 97; 2 Liv. Agen. 245; 2 East. Rep. 142; 6 Term. Rep. 146.

Black, contra. Whose note is it? It is not a joint note. It is either one or the other.

It may be supposed that defendant might have placed funds in the hands of his agent to pay, and the agent, from this view, alone is liable.

He relied on reason and common sense.

One may be employed to buy a pair of horses, and the horses may be for defendant's use, yet defendant may have given money and the agent choose to give his note—whose note is it?

Per Curiam.—The case of *Fash* vs. *Ross*, (2 Hill, 294,) is conclusive of the case before us. We are not disposed now to question the authority of that case.

The motion is dismissed.

The whole Court concurred.

See 2 McM. 402, *Varnum* vs. *Evans; Robertson* vs. *Pipe*, in Errors, 1 Rich. 501, overruling this case, and also *Fash* vs. *Ross*, and *Moore* vs. *Cooper*, 1 Sp. 57. *An.*

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*354] *JOHN PORTER *vs.* LUCY and JOHN KENNEDY.

The possession contemplated by the Statute of Limitations must not only be notorious and definite at one period, but it must, in some form, be continuous, during the statutory time: that is, it should be definitely used, for some purpose, for ten years.

Although "*possessio pedis*" does not require actual occupancy, it implies enclosure, and use of the grounds enclosed.

The enclosing and sowing down a small turnip patch on a tract of land, and occupying it but for one year, and occasionally cutting and hauling from it firewood and other timber, will not be sufficient to defeat another, or give a title to land, under the Statute of Limitations.

Before BUTLER, J., at Union, Extra Term, 1841.

This was an action of trespass to try titles, and is fully explained by the report of his Honor.

The plaintiff claimed under John Norvell, and had a regular title from him. The defendants are the widow and child of Benjamin Kennedy, and entitled to his lands. In 1817 or 1818, Benjamin Kennedy and Norvell made an exchange of lands. Norvell was to have a part of a grant of land to Wm. Kennedy, (the father of Benjamin,) lying near to his house, about eight and a half acres, which he had enclosed at the time of the exchange, and which he cultivated till it was worn out. Kennedy was to have, in lieu thereof, about forty acres, being almost a mile from Norvell's house, and almost a half mile from Kennedy's, and adjacent to the main tract of land on which Kennedy resided. Richard Thomson, a surveyor,

was called on by both parties, as he and two other witnesses said, to lay off to Kennedy his land. A line was run at the time, which the Kennedys have regarded as their boundary ever since, always claiming the land below it. Benjamin Kennedy, in his lifetime, took no actual possession of this forty acre piece, but occasionally cut firewood on it. About 1824, Benjamin Kennedy died. In 1826, the defendant, his widow, understanding that Norvell intended to claim the land notwithstanding the exchange, sent her negroes and fenced in and sowed down in turnips about one-quarter of an acre of the land, with the avowed design of asserting her title and acquiring actual possession thereon. No turnips or other crop was afterwards planted, but the enclosure remained, and part of the rails are there now, or were there when the land was resurveyed in *this case. Mrs. Kennedy has continued to cut and haul wood from the premises ever since the death of her husband, [*355 and has, during that time, regarded the land as her own, never having been interrupted in the enjoyment of it till this action was brought, and after she had commenced to make a permanent clearing on the place. Years after the turnip patch was enclosed, the tract of land on which Norvell lived was sold at sheriff's sale. The sheriff's deed does not exclude in terms, this land, now in contention, but conveys all Norvell's land in hand, in a grant to Huger, which includes this. The part that Norvell got on the exchange, he held long enough to give him a title by the statute of limitations; and the question of law was whether Mrs. Kennedy had such a possession as would give her a title to the part claimed by her: that is, whether she had taken, by enclosing the turnip-patch, such a possession as should be regarded a disseisen of Norvell, and whether it was continued long enough by the enclosure remaining on it, and by her continuing to cut and haul away firewood, as to bar the right of those claiming under Norvell.

Norvell was sworn as a witness, and declared that he never had made an exchange with Benjamin Kennedy, in his lifetime, but said that Kennedy was to give him forty acres for that which was laid off, or pay him money, and that his taking the part adjoining his own house was no part of the bargain. In this statement, he was contradicted by his own admission, made at the time the line was run, as well as his repeated declarations afterwards; but whether the line had been run by his consent, and for the purpose stated by Thomson, and other witnesses, was a question which I submitted to the jury, with perhaps a distinct intimation that I did not think much importance was to be attached to Norvell's testimony, on the facts deposed to by him. I thought it was very evident from the time the line was run, that the Kennedys regarded it as a color of title indicating the extent of their claim and possession; and the real question in the case is, was there such a possession as to give title to the line? I instructed the jury that they might come to that conclusion, if they thought the possession in the first instance was so notorious as to give Porter notice of it at the time, and was continued under such circumstances as to give the plaintiff the same notice of a deliberate design to claim the land on the part of Mrs. Kennedy. She *took possession fourteen years ago, and has continued to use the land ever since, [*356 by cutting fire-wood on it.

The jury found for the defendants. I cannot say that I am entirely

satisfied with the law, though I am entirely so with the justice of the proceedings.

The plaintiff appeals, on the grounds:

1. Because the Court held that the possession of defendants, or rather the trespass of the defendants, was sufficient to give title against the plaintiff, and those under whom he claimed.

2. Because the question whether the contract to exchange lands between John Norvell and Benjamin Kennedy, was ever fulfilled by Kennedy, was not submitted to the jury.

3. Because the verdict was contrary to law and evidence.

Herndon, for the motion. The running of the land by a surveyor is not a title. The party must recover by adverse possession.

A party clearing a small turnip patch in a remote part of the land, and using it only for one year, and then abandoning it, is not possession.

The running of land by a surveyor, and the cutting of timber in the way in which these parties did it, will not confer a title by the statute of limitations.

What kind of possession is necessary to give title by statute of limitation?

Cited 2 N. & McC. 343 and 544; 2 Johns. Rep. 230; 10 Johns. do. 477; 4 Mass. T. Rep. 418–19; 2 John. Rep. again, 230.

Kennedy's land was contignous to the forty acres taken in exchange from Norvell, and as Norvell was in actual possession of the eight and a half acres, the law would conclude that Kennedy was equally in actual possession of the forty acres.

Dawkins, contra. Would Norvell have been barred by the statute of limitations? If so, then the verdict will be sustained.

There was a distinct purpose in the defendant to assert her rights to the land, and her occupying, and the notoriety of her possession, was of that character
*357] which would place the *party on his guard, and show him that there was a claim adverse to his.

If defendant's possession was good against Norvell, would it not be good against those claiming under the sheriff's deed?

Curia, per BUTLER, J. In 1826, the defendant, with a view of asserting her right to the land, cleared and sowed down the turnip patch described, and thereby acquired such a possession as might well be regarded a disseisin of Norvell, and a sufficient origin of a good title in herself. This disseisin and possession could not, however, ripen into a title without ten years continuous and open use of the land. The possession contemplated by the statute of limitations, must not only be notorious and definite at one period, but it must in some form, be continuous during the statutory time. That is, it should be definitely used for some purpose for ten years.

Although *possessio pedis* does not require actual occupancy, it implies enclosure, and use of the ground enclosed. I will not undertake to indicate in what way it should be used; in general, it should be cultivated, or perhaps it might be sufficient that it should be used for pasture. It is sufficient to say that defendant was in possession of this land but for one year, which could not avail her in defeating the rights of any of the parties interested in it. As against the purchaser at sheriff's sale, or the plaintiff, there was no such trespass by possession, as to entitle either of them to an action to try titles. Until the trespass had been committed for which this action was brought, the plaintiff's title was not put in jeopardy, and he was not bound to sue, and of course, as long as he had no cause of action, defendant had no

foundation of title. The cutting and hauling of timber by defendant, could not effect a divesture of plaintiff's title, according to our adjudications. According to these views, the plaintiff must have a new trial, and the motion is therefore granted.

RICHARDSON, O'NEALL, and EVANS, JJ., concurred.

GANTT, J., dissenting. I do not concur in this opinion. Norvell and Kennedy made an exchange of lands. Norvell took possession of the lot which he took in exchange, and held possession long enough to give him title by possession. *Kennedy exercised ownership over the land [*358
he took in exchange for the lot. A small spot was cleared and fenced for a turnip patch.

I think, under all circumstances, a title by construction, may well pass to Kennedy, &c.

See Infra, 447; 6 Rich. 62; 9 Rich. 27. *An.*

HENRY PARIS *vs.* EDMUND WADDELL.

In an action on the case, where the facts as to probable cause are not disputed, a Judge may take upon himself to say what is, and what is not, probable cause. But where the facts are contested, probable cause becomes a mixed question of law and fact, to be decided by the jury, under the instructions of the presiding Judge.

Before BUTLER, J., at Greenville, Fall Term, 1840.

This was an action on the case, for malicious prosecution. The alleged cause of action was, that defendant caused plaintiff to be apprehended for a criminal participation, with his own slaves, in stealing a hog of the defendant. The history of the case will indicate its character. Long branch runs through swamp and forest lands that are a common range for hogs. The plaintiff lives about three miles from it, and defendant one. On the 6th of March, 1839, the plaintiff, an old man about eighty-four years, old, borrowed a cart from his neighbor, Mrs. Townes, and sent two of his own negroes, Bob and his son, with it into the woods, to catch and bring home some wild hogs which he supposed he had a right to. One of Mrs. Townes' negroes was also along. Whilst the negroes were in the swamp, a Mr. Dean was passing along, and hearing dogs, went to the place where they were barking. He found Bob there, standing by a hog that had been caught and tied, the other two negroes being at some distance off. Whilst the witness was talking to Bob, a sow with some pigs, nearly large *enough to be weaned [*359
came up following his horse's tracks, and after smelling the horses legs, the sow went off rooting Bob remarked that the sow was unmarked, and that he should catch her. The witness told him not to do so, that she belonged to Waddell. Bob said that he had been informed that it was lawful to take up in the woods any hog that was unmarked, over six months old. Witness again told him that he had seen the sow and pigs at the defendant's, and he was confident they

belonged to him. Bob hallooed for the other negroes, and told them to go on and look for hogs; that he would be on presently. The witness went off, and in a short time heard hogs squeal and dogs bark; went to the place and found they had caught this unmarked sow. Other hogs coming up, the dogs let her go, but by the direction of Bob, she was again caught. The witness went immediately to defendant's and told him all he had seen. The defendant asked him to go over with him to Paris's, saying that was not the first of his hogs that had been taken, and that he would not submit to it any longer. When Waddell and witness got to Paris's he was feeding the sow in a pen, while his negroes were altering the other hog. Waddell recognized his sow, and said to Paris, you ought not to let your negroes go in the woods so far from home to catch hogs; you have got one of my hogs in the pen, and it is not the first time the thing has happened, and if you don't let my hog loose immediately, I will have you indicted. The witness said Waddell was in an ill humor, and rode off. The Monday after, (and while the sow was in the pen, for she was not turned out for a week,) the defendant went before Richard Thurston, a Justice, and detailed all the circumstances of the case; and made the following affidavit:

"That he had just reason to believe that Henry Paris had in his possession a hog belonging to him, the said Waddell; that said Paris's negroes, Bob and Hense, stole said hog, and carred it to Henry Paris's and there had it in pen, said Henry Paris knowing it." Upon this, the Justice issued a warrant for Paris and his negroes. Paris was arrested and gave bail. The negroes were subsequently arrested on another warrant, and tried before Justices and Freeholders for stealing the hog. The negroes were acquited.

*360] *Two or three members of the court were sworn, who said they did not think there was any just grounds to charge the negroes with a larceny. The justice, however, Thurston, thought the negroes ought to have been punished. The warrant against Paris was returned to the solicitor, who entered thereon a *nol pros.* An order discharging Paris from his recognizance was obtained, and this action commenced. The plaintiff proved an excellent character; and that he had sent the negroes openly into the woods with the cart; that he kept the sow for some days in the pen, and had her examined by some of his neighbors, who gave it as their opinion that she was a wild hog. The plaintiff also proved, that on the trial of the negroes, defendant had said to some of the persons present, that all the fat hogs in Long branch belonged to Paris; and had said that was not the first time that his hogs had been taken by Paris's people. The defendant introduced evidence to show, that plaintiff's negroes were under little or no control or discipline. A Mr. Magnis was sworn, who said that a year or two ago, he had been hired by Mrs. Townes to go into Long branch and search for hogs; that he and Mrs. Townes negroes had caught and killed two hogs, one of which turned out to belong to a Mr. Andrew Young, who came into the woods and took it off, having told the witness and negro, that the other belonged, from the mark, to Waddell. After advising with some persons, the witness, Magnis, carried the hog to Paris, where he was living, and asked him to take half, which Paris did; both agreeing, that if the hog should ever be claimed by any one, they would pay for it. They did not, how-

ever send word to Waddell, particularly, that they had divided the hog, which was said to be of his mark.

The case went to the jury, and I charged them on the general principles of the law—saying, that if the facts were undisputed, it was the duty of the judge to say, whether probable cause had been shown, or the absence of it. That when the facts were contested, as they were here, in in this case, the case must go to the jury, with such remark as the judge might think proper to make. That I thought the conduct of the negroes reprehensible; and to say the least of it, they had committed a censurable trespass; for there was no doubt but the sow belonged to plaintiff, and that they had been *apprised of it; that although defendant had no sufficient cause to charge felony against the negroes, there [*361 was some excuse for it; but that where the defendant had gone and charged the master with a criminal participation in the guilt of the slaves, as I thought he had done, by the terms of his affidavit, I thought he had gone too far; unless, indeed, he had good reasons to believe that Paris knew the hog to be his, the defendant's, when the negroes carried it home. That if Paris had been informed fully, by the negroes, of all that had occurred between them and Dean, it was his duty to have sent for Waddle, or to send word to him, &c. But that if Paris believed that the negroes had brought home a wild hog, to which he had any right or claim, he was, in fact, guilty of no offence in having the hog put in his pen; and that Waddell should have made diligent inquiry as to the facts of the case, before he took out the warrant. That the criterion in such a case, should not be, what would a kind and generous neighbor have done, (for such an one, no doubt, would have forborne any proceeding of a criminal nature,) but that the question should be, what might a reasonable man have done under the circumstances? Was there ground for suspicion to any mind not blinded by malice or misled by prejudice? That if there were just grounds for suspicion, at the time that Waddell made the charge, he might be excused; but if there were no such grounds of suspicion, against Paris, to an ordinary mind, the jury should find a verdict against him. Verdict for the defendant.

GROUNDS OF APPEAL.

1. That his Honor, the presiding Judge, should have decided the question of probable cause, as a question of law, and not have left it, as he did, as a mere question of fact to the jury.

2. That at any rate, the question of probable cause, as a mixed question of law and fact, should have been decided by his Honor, in alternative views of the facts, leaving to the jury the application of the law to the facts, as they might have been found; whereas, the question of probable cause was left to the jury, as much as the question of damages, without any instruction to the jury of the peculiarities of this question.

3. The Judge in his charge said, that if the jury supposed *defendant regarded the conduct of the negroes, (mentioned in the evidence,) as [*362 larceny, that might constitute probable cause.

4. There was no probable cause proved.

5. In addition to the want of probable cause, express malice was proved against the defendant.

6. Because the verdict for defendant, is against the law and facts of the case.

Townes, for the motion. From examination of all the authorities, the two first grounds are sustainable.

There was no conflict in the facts of the case, and it was the proper province of the Judge to decide the question of probable cause, either as taken in the first or second ground.

The jury are not capable of discriminating.

Probable cause, a question of law. Cited *Taylor* vs. *Cooper and wife*, 2 Const. Rep. 208; *Lipford* vs. *McCollum*, 1 Hill, 82; 2 Selwyn N. P. 1061; 1 Term. Rep. 505; Bull. N. P. 14; *English* vs. *Cleary*, 3 Hill, 279; *Douglass* vs. *Strong*, 2 R. Dig. 116; Starkie, 112.

Young, contra. Two things are necessary to enable the plaintiff to recover; 1st, Absence of probable cause; 2d, Malice.

The Judge has done all that he could, by fairly submitting the case to the jury, for their decision.

Wardlaw, in reply, cited, in order to show that the want of probable cause should have been decided by the Judge, 22 Vol. Eng. Com. Law Rep. 56, 196.

Curia, per BUTLER, J. From the way this case went to the jury, they had a right to say that defendant had no probable cause for his proceeding. Under the circumstances, the plaintiff could not have asked for more. He had an opportunity to obtain a verdict upon the only view of the facts which could have authorized it. For my brethren are all of opinion that from the most obvious view which could have been taken of the case, defendant had probable cause for his complaint to the justice. Had he reasonable grounds to believe that plaintiff was informed of all the circumstances under which the hog was taken? to wit: that the *363] negroes *had caught a hog, which they were informed belonged to the defendant; and did they carry it to plaintiff, and tell him all the circumstances? If so, plaintiff was wrong in countenancing his negroes in a highly censurable and reprehensible proceeding. He did not, perhaps, intend to be dishonest himself, but he was sustaining his negroes in dishonesty.

In this point of view, defendant had reasonable cause for instituting some proceeding to reclaim his property, and to prevent future depredations on it. As a generous neighbor, he might have forborne; but legally, he was under no obligation to do so. It is the duty of the Judge to present the facts, in their different points of view, when they are controverted, and to say, according to one or the other view, there would or would not be probable cause. There can be no artificial rules for presenting alternatives to a jury. Where, as in this case, the facts were disputed, and were susceptible of different views, so far as the motives of the parties were concerned, the Judge could not have taken on himself to rule, positively, one way or the other. The case, under such circumstances, properly went to the jury; and the facts were so explained, as to present the alternatives for their consideration and decision.

It is only in cases where the facts are not disputed, that a Judge should take upon himself the responsibility of saying what is probable cause. It is only in such a case, that the question of probable cause is entirely one of law.

In none of the cases referred to by plaintiff's counsel, did the Judge undertake to decide himself, what was probable cause, where the facts were at all disputed. The cases in 22 E. C. L. R. 53 and 196, presented no new question. In one, the C. J. decided that defendant had probable cause for the prosecution against the plaintiff, and nonsuited

the plaintiff; but the facts in that case were not at all disputed, and the Judge was obviously right. In the other case, the facts were complicated and disputed, and all the Judges said there could be no definite and uniform rule laid down in such cases. The general rule is recognized, that where the facts are contested, probable cause is a mixed question of law and fact, to be decided by the jury, under the instructions and explanations of the presiding Judge. In these instructions, the different alternatives must be presented; that is, upon the assumption of one state of facts, or another, the Judge must say what would or *would not constitute probable cause. An attempt to subject every case to abstract and artificial rules, is vain. Each case must, and will, be modified by its own circumstances, to some extent. [*364

It is enough to say, that in the case under consideration, the plaintiff has no cause to complain of the manner in which his case was submitted to the jury. If the verdict had been against the defendant, he, perhaps, might have complained that the Judge did not interpose, to prevent a verdict being rendered against him.

The motion for a new trial is refused.

RICHARDSON, O'NEALL, and EVANS, JJ., concurred.

See *Horn* vs. *Boone*, 3 Strob. 309; *Campbell* vs. *O'Brien*, 9 Rich. 207. *An.*

WILLIAM BELL *vs.* B. V. LAKIN.

In an action on the case, for employing a slave that is a runaway, to entitle the plaintiff to recover damages, where he has alleged the defendant's acts to have been done with a *scienter* of the fact that the negro was the runaway slave of the plaintiff, he must prove the *scienter*, unless, from the circumstances, the law would presume it.

Where a declaration contains an averment that is foreign to the issue, and which may be rejected as surplusage, it need not be proved. But every material averment must be proved.

Before O'NEALL, J., at Fairfax, July Extra Term, 1840.

This was an action on the case, in which the plaintiff declared against the defendant in six counts; 1st, for enticing away his slave, knowing him to be so; 2d, for harboring him while he was a runaway, knowing him to be so runaway, and to be the slave of the plaintiff; 3d, for enticing away the slave with the same *scienter*, and with some variations from the first count; 4th, for receiving the said slave, knowing him to be a runaway, and to be the slave of plaintiff; 5th, for giving the said slave a certificate that he was free and entitled to the *proceeds of his labor, knowing him to be a runaway, and the slave of the plaintiff; and laying special damage, the amount of the gaoler's bill in Columbia, for the detention of the said slave in gaol; 6th, the same as the 5th, except, that further special damage to the amount of the physician's bill for attendance on the said slave is laid. [*365

It appeared that Robert, a slave of the plaintiff, a bricklayer by trade, escaped from him, in 1833, and remained out of his possession until after May, 1838, when he was taken up in Columbia, by Joshua Sowden, who

lodged him in gaol, where he remained until claimed by the plaintiff, who paid the gaoler's bill, $74, and the physician's bill for attendance on him while in gaol. He had in his possession a certificate, signed by the defendant, as his guardian, in which he was called Thomas Oree, and was stated to be a free man, and entitled to receive, as such, the proceeds of his labor. The defendant, on the 12th June, 1838, wrote to Sowden, stating his knowledge of Thomas Oree to be, that he had passed for some time as a free man; that he had been three years before in his employment; that he then had in his possession papers showing his freedom, which he did not critically examine. The value of the slave's services while absent from his master's service, was shown to be one dollar per day.

The defendant clearly and abundantly showed, from most respectable testimony, that the negro man calling himself Thomas Oree, came into Lexington District in '32 or '33, as a free man; that he was from that time until he went to Columbia, in May, 1838, treated and considered by all who knew him in Lexington, Newberry and Fairfield, as a free man; that he was during that time, and before the defendant was appointed his guardian, employed by such men as David Montgomery, of Monticello, Maj. Charles Montgomery, of Fairfield, Capt. John Counts, of Lexington, and Col. William Counts, of Newberry, as a bricklayer and a free man. In '35, while the defendant, with his family, was at the Pacolett Springs, his nephew, Parr, employed the man (Thomas Horee, as he was then called, afterwards ascertained to be Robert, the slave of the plaintiff,) for one month, to work on the defendant's mill dam, and for which he paid the negro. This was the only work he ever did for the defendant. On the 5th of June, 1837, the defendant was appointed, by the *clerk of Fairfield, (in which the negro then resided,) his guardian, and he thereupon gave the certificate of freedom before spoken of

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The jury were instructed that the plaintiff must recover on the case made by his pleading, or fail. That as to the three first counts, there was no proof to sustain them, and that the cause turned upon the three remaining ones. As to which they were told, that in them, the plaintiff, having laid the defendant's acts to have been done with a *scienter* of the fact, that the negro was the runaway slave of the plaintiff, he could not recover without proof thereof, unless the law presumed the *scienter*. There was no proof that the defendant had any information or knowledge which would lead him to believe the negro was a slave.

Generally speaking, the law of master and servant, as existing in England, applied to master and slave in this State. There are here, however, two exceptions, arising from color and property.

The first of these makes the distinction, that slavery is presumed to be the condition of the negro, until the contrary appear. I gave it to the jury as my opinion, that reputation, and passing as free, would be *prima facie* evidence of freedom, until the fact of slavery was shown. They were told it would admit of a grave question, whether, if a slave, with the knowledge of his master, acted as a free man, and passed as such, for four years, it would not establish the fact of freedom, as against the master, so as to make the slave liable to seizure, as being emancipated contrary to law. This was illustrated: 1st, by showing that the right of property in a slave might be lost by four years adverse possession; and

2d, that after twenty years of acknowledged exercise of the rights of a free man, a deed of manumission regularly and properly executed, would be presumed.

The next distinction arises out of the *status* of the negro, as property in this State. In England, to make one liable for the employment of a hired servant, a knowledge of the fact of the servant being previously employed, must be brought home to the defendant. But here, the employment of the slave of another, with or without the knowledge of the fact, would make the person so employing liable for the wages of the slave, to the master. If, therefore, the plaintiff here had *counted for the mere employment of his slave, without a *scienter*, or in trover, I should have said to the jury that he was entitled to recover for the month which the slave worked on the defendant's mill-dam, in 1835. But there was no such count, and the plaintiff could not, therefore, recover on this ground. [*367

The jury were directed to inquire, 1st. Can the plaintiff recover on the fourth count, for receiving the plaintiff's slave? This, I told them, depended on the fact, whether the defendant received the negro, knowing him to be a slave. For, I said to the jury, that to make the defendant liable, it was not necessary that he should know the negro to be the slave of the plaintiff. It was sufficient if, in law or fact, he had enough to create the knowledge that he was a slave. On this part of the case, I told the jury that the fact that the defendant found the negro in an admitted and acknowledged state of freedom, which he had exercised for years, rebutted the legal presumption of slavery arising from color, *so far as the defendant was concerned*, and therefore left the *scienter* unproved; and hence, on this count, the plaintiff could not recover, unless they should think the defendant in fact knew the negro to be a slave.

They were then told to inquire whether the defendant was liable for giving the negro the paper certifying that he was a free man, and entitled to the proceeds of his labor.

The jury were told, that in many cases of injury to property, the intention with which the act was done, had nothing to do with the question, whether the plaintiff was entitled to recover. Here, however, I thought the plaintiff's right to recover depended very much on the defendant's intention. If the paper had been given by any one not a guardian in fact of the negro, I should have thought it such a reckless interference as might have made him liable to the master, in some form of action. But here the act was done by one supposing himself to have the legal right. The Act of '22,(*a*) requires every free male negro to have a guardian, to be appointed by the clerk of the district in which he may reside. The clerk appointed the defendant guardian, and his act in that character, in giving the negro the certificate of freedom, and that he was entitled to receive the proceeds of his labor, would not make *him liable, *unless he knew the negro to be a slave.* (*b*)If, however, he [*368

(*a*) 7 Stat. 462, § 7. *An.*

(*b*) In illustrating this part of the subject, the jury were told, if, on retiring to their room, they should be satisfied that they, with the information which the defendant had, would have acted as he did, then I thought it would furnish a pretty good test of his good faith, and that he ought not to be liable.

knew the negro was a slave, then he would be liable for all the damages claimed.

The jury found for the defendant, and the plaintiff appeals, on the annexed grounds.

GROUNDS OF APPEAL.

1. Because the plaintiff, having proved that his runaway slave who labored as a mechanic, was worth a dollar per day, was in the employment of defendant upwards of a month, and that the defendant became the guardian of the negro, and gave him a permit, in writing, to contract and trade for himself, and to receive payment for his work, about a year before he was apprehended, the verdict of the jury is contrary both to the evidence in these particulars, and to the law applicable thereto.

2. Because his Honor, the presiding Judge, erred in charging the jury:

1st. That if the defendant had reason to believe that the negro was free, he was not answerable for becoming the guardian of the negro, and for giving him the ticket.

2d. That if one of the jury would have become the guardian of the negro, the plaintiff was not entitled to recover.

3d. That the plaintiff could not recover without proving that the defendant knew the negro was a slave.

4th. That it might be a question whether a slave passing as a free man for four years, might not be entitled to his freedom.

5th. That the plaintiff could not recover for the month's work in this case.

3. Because the defendant, having employed plaintiff's runaway slave, and having given him a ticket to contract and trade for himself, and to receive payment therefor, was liable in law.

J. Gregg, for the motion; on the first ground, contended, that having failed to prove that the defendant knew the slave *to be a runaway, plaintiff could only recover for the month's labor with the defendant, and in his employ during the year 1835. *369]

It is said that if the plaintiff had alleged and proved that the defendant knew the negro to be a runaway, then the plaintiff might recover for the month's work; but it is not necessary to prove every immaterial averment. There are some immaterial averments that should be proved, and others that should not.

Cited *Bristoe* vs. *Wright*, 2 Dougl. 665. Immaterial averments, 6 Term Rep. 496. *Pippin* vs. *Solomon*. Upon defendant's *scienter*. *Williamson* vs. *Allison*, 2 East, 446.

If the plaintiff had been able to prove the *scienter* in the defendant, he might have recovered the amount of the whole time the negro was run away.

In what cases must the *scienter* be alleged and proved?

When the act itself is illegal, the *scienter* need not be alleged or proved.

The intention with which a party commits an act in criminal cases, is always inquired into; but in civil cases the reverse is the case. The inquiry is, what damage has the plaintiff sustained?

Wherein does the difference exist, between giving the negro a free pass and employing him for one month?

The ground of action is not the benefit that the defendant received, but the injury that the plaintiff received, and the injurious effect produced by this act.

J. A. Woodward, contra, contended there was a striking difference between the position of the plaintiff and the defendant.

If the defendant be guilty of no fault, no tort, or gross negligence, then the party is free from any damage.

The defendant was not proved to have any knowledge of the negro being a slave. Cited Esp. Dig. 599, fourth paragraph; *id.* 619, second paragraph.

The negro's having possession of himself for four years, was a strong presumption that he was free, and the defendant could consequently have committed no wrong.

Defendant, if liable at all, is liable for the month's work, in action of debt, by *sum. pro.* and not in the form of the action *brought. But he contended [*370
that he was not liable at all, for he was presumed free, and defendant had, under that view, the right to hire him. The negro was free to hire himself and receive compensation for his labor. Defendant paid the negro for his hire, and was free from any blame.

A party may become the guardian of a slave, even pending the question of freedom.

Cited, on Guardians, 2 Brev. 160.

For giving a permit to a slave, no action lies; but if one presumes to give a permit to a slave against the will of the master, the party shall suffer by indictment, and also by civil process.

Curia, per O'NEALL, J. In this case, this Court is satisfied with the instructions of the Judge below to the jury.

The only point on which it is proposed to make any additional remarks, is that assumed by the defendant's counsel here, that the *scienter* laid in the declaration, was an immaterial averment, and need not be proved.

There is no doubt that where a declaration contains an averment which is foreign to the cause, and which may be rejected as surplusage, that it need not be proved. *Bristow* vs. *Wright*, (Doug. 667.) The application of this rule will be seen, by referring to *Pappin* vs. *Solomon*, (5 T. R. 496.) The action there was on a policy of insurance on a ship "at and from London to ———, and thence back again to London."

The declaration averred, that after making the policy, to wit:—on the 10th of August, 1792, the ship was in safety at London. She sailed before the policy was executed, and was lost on her return voyage; it was held that the averment was immaterial. For it was in no wise connected with the right of the plaintiff to recover, or the liability of the defendant. So, too, in *Williamson* vs. *Allison*, (2 E. 446,) the action was a warranty, and it was held, that the averment of the *scienter* was immaterial.

That proceeded upon the ground, that the gist of the action was the breach of the warranty.

In it, I think Laurence, J., stated the true rule when he said, "if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to *prove it. But otherwise, [*371
if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover."

In the case before us, is the *scienter* a material or immaterial averment? I think there can be no doubt that it is a material one. The three last counts are the only ones upon which the plaintiff's proof raises a question to be met by the defendant. The charge in the fourth count, without the *scienter*, would be, that the defendant received the slave of the plaintiff. It cannot be intended, that standing thus, the plaintiff could recover; for there is nothing unlawful or prejudicial to the plaintiff, in barely receiving his slave. A man may lawfully retain the possession of another's goods, which he finds, until the owner demands them. So, too, if one is in the possession of the goods of another, and makes no use of them, and sets up no claim to them, it could not be pretended that an

action could be maintained. Stripped of the *scienter*, there is nothing in that count which could maintain it. Take the fifth and sixth counts, in connection with the proof, and take away the *scienter*, and the defendant has merely, (in the discharge of a legal duty, arising out of facts then supposed to be true, and which afterwards turned out to be false,) done an act which did not prejudice the plaintiff. For at the time the certificate of freedom was given, the negro had been, for nearly four years, out of his master's possession, and more than one hundred and fifty miles from him. The most that can be said is, that the defendant's certificate was founded in a mistake of facts. If he acted *bona fide*, he could not be liable, This makes the *scienter* the gist of the action.— These views, it seems to me, sufficiently dispose of the argument that the averment was immaterial. But I am disposed to look a little further into the case. I have no doubt, as I said on the circuit, if the plaintiff had added a count to his declaration, in Trover, he might have recovered for the month's work done for the defendant, by the slave, in '35. For that might have been a conversion by the use of the slave for that time. But in the absence of such a count, the plaintiff had no pretence to recover in this case. So far as this action was concerned, the defendant
*372] was chargeable exactly upon the *principles which would charge a man in England for the employment of the servant of another, or for continuing such employment after notice. In both cases, the *scienter* must be alleged and proved. *Blake* vs. *Langon*, (6 T. Rep. 221.) The reason why this is so in this action, is because the action does not so much rest upon the right of property, as it does upon the relation of master and servant. For the violation of that relation, no action, in general, lies, unless knowledge is brought home to the defendant. Looking to the injury done to the right of property, it would be redressed by an action of Trover, or by an action of Assumpsit for the wages of the slave, while working for the defendant. To neither of these actions, would the payment of the wages to the slave, be any defence. For in law, he had no right to receive them. But the action before us claims a higher consideration; it is, that the defendant, knowing the relation of master and slave, chose to violate it in the manner pointed out in the declaration. This makes an entirely distinct case, and if the proof does not support it, the plaintiff cannot recover. The case of *Quay* vs. *McNinch*, (2 Con. R., by Mill, 78,) goes much further than I go in this case. For it holds, that where a defendant hired a negro reputed to be free, and found in a state of freedom, that trover would not lie for his use. That case, however, makes this position undeniable. That to entitle the plaintiff, here, to recover, it was essential to show that the defendant knew the negro to be a slave.

The motion for a new trial is dismissed.

The whole Court concurred.

Cited 4 Rich. 475; 1 Rich. 324; see as to surplusage—4 Rich. 297; 2 Strob. 273, 278. *An.*

*THOMAS JONES *vs.* JOHN A. CRAWFORD. [*373

A deed executed by a debtor, with the view to defeat, delay, or hinder a creditor, is void.

The judgment under which the land is sold, at sheriff's sale, becomes a part of the title of the purchaser.

A debtor taking the benefit of the "prison bounds' Act," rendered in his schedule, *inter alia*, a small tract of land, and assigned his schedule to W. F. P., (the plaintiff in the case on which he had been arrested.) W. F. P. afterwards assigned his right to the assignment, the judgment, and the *ca. sa's.* not under seal, and without witnesses, to the plaintiff. He constituted P. E. P. his attorney, to sell the land, who advertised, sold, and became the purchaser of it, and afterwards conveyed to the plaintiff: *Held*, that the deed of P. E. P. was null and void, and that the assignment of an assignment cannot have the effect to pass land.

An instrument to pass the title of land, must be under seal, and witnessed by two witnesses.

The true view of an assignment under the "prison bounds' Act," is not that it vests the assignor's estate absolutely in the assignee, but that it operates as a mere authority to him to enter upon, recover, sell, and convey, in satisfaction of the debt.

Before O'NEALL, J., Richland, Spring Term, 1841.

This was an action of trespass to try titles to a small tract of land in the neighborhood of Columbia, called "Farmer's Inn."

The land was the property of one Hinson Barker. The plaintiff gave in evidence the recoveries of *Wm. F. Pearson* vs. *Hinson Barker*, in two cases, and *ca. sa's.* issued thereon. Under them Barker was arrested, and petitioned for the benefit of the prison bounds' Act; with the petition he filed a schedule, containing, *inter alia*, "Farmer's Inn." Barker assigned, in January, 1835, his schedule to Wm. F. Pearson. Soon afterwards, Pearson assigned, by writing, not under seal, and without witnesses, the judgments, *ca. sa's*, and assignment, to the plaintiff, Jones. He, (Jones,) constituted Philip Edward Pearson, Esq., his attorney to sell Farmer's Inn. He accordingly gave public notice, and in July, 1836, sold it, at public outcry, and bought it for the plaintiff, and conveyed it by deed to the plaintiff. An acknowledgment of tenancy to the plaintiff, signed by Barker and wife, was given in evidence.

It appeared that Jones, (the plaintiff,) was the brother of Mrs Barker, and that to him had been conveyed the only negro *which Barker and wife had in possession, and her entire interest in her father's [*374 estate. The defendant purchased Farmer's Inn at sheriff's sale, in October, 1837. It was sold under execution, as the property of Hinson Barker, in the case of *John Black* vs. *McPherson* and *Barker*. The judgment, execution, levy and sheriff's deed, were given in evidence. It appeared that Barker was in possession, when the land was sold by the sheriff; and that his possession had remained unchanged, notwithstanding the assignment to Pearson, and the supposed acquisition of title by Jones. Barker was wholly insolvent.

The jury were instructed that the plaintiff might recover on the acknowledgment of tenancy by Barker to Jones, if Jones' title was not affected by fraud. They were told that Wm. F. Pearson's assignment of Barker's assignment to him, could not convey the land to the plaintiff.

Land could only pass, *inter vivos*, by deed executed in the presence of two witnesses; that Philip Edward Pearson's conveyance to the plaintiff, was a mere nullity; it was the conveyance of the agent to his principal, which was rather worse than the conveyance of a man to himself

The jury were told, in making up their conclusion whether Jones' title was fraudulent, they might look to the facts, that he was the brother-in-law of Barker; that to him his entire estate had been conveyed; and that Barker had been suffered to remain in the possession of the land, to the time when seized and sold by the sheriff. From these facts, they were told they might find against Jones' title, as affected by fraud against creditors. For the defendant, a purchaser at sheriff's sale, stood in the place of the creditor under whose execution he derived title.

The jury found for the defendant, and the plaintiff appeals, on the annexed grounds.

GROUNDS OF APPEAL.

1. Because his Honor charged the jury that they were at liberty to presume fraud against the plaintiff, from the fact that he permitted Barker, his relation, to remain on the premises after he had sold the same to him, as tenant of the premises.

*375] 2. Because his Honor charged the jury, that the defendant *occupied the same position as a creditor of Barker would have occupied had he been the purchaser.

3. Because his Honor charged that the assignment of William F. Pearson, to the plaintiff, of the assignment to him, of said house and lot, was a nullity; and that the assignment of the *fi. fa's.* and *ca. sa's.* for the satisfaction of which Barker's assignment was made, to said plaintiff, by said Pearson, made no difference in the case.

4. That the verdict was contrary to the law and the evidence.

Black, for the motion, said, Crawford claims under a title that cannot be maintained.

By the assignment, the legal estate passed to Wm. F. Pearson. This is not impeached for fraud.

The estate being in Pearson, he might sell; had he conveyed, a title would have passed; but Pearson assigned to Jones.

The equitable interest then passed to Jones, who constituted Pearson his agent to sell; he did sell—purchased Farmer's Inn, and conveyed, by deed, to plaintiff.

Farmer's Inn was sold under an execution against Barker. That sale gave Crawford no title, for Barker had none.

Jones may have acquired his claim to the negro and estate of Mrs. Barker, by fraud, but it has no application to this case.

The jury were instructed that they might presume fraud.

W. F. De Saussure, contra, submitted the case without argument.

Curia, per O'NEALL, J. In discussing this case, I will first consider the second ground of appeal, which supposes that the judge below was in error in saying that the defendant occupied the position of the creditor under whose judgment he bought This will only need to be touched, to be placed in its proper point of view.

As against a creditor, a deed executed with a view to defeat, delay or hinder him, is void. He is therefore at liberty to treat the estate of his debtor, thus conveyed, as if no such conveyance existed, and to sell it in satisfaction of his debt. (*a*) The purchaser buying at such sale, must be

(*a*) 4 Rich. 129.

permitted to show all the facts which make his title good, or else a sale by the *creditor would be of no importance. To do this he must stand in the place of the creditor. Indeed the judgment is a part [*376 of his title, and for that reason, if there was no other, he must be allowed to show the same facts which the creditor could, in order to give it effect.

This much I have thought it necessary to say, in answer to this ground, in the hope of making that past all future dispute, which has been heretofore treated as not admitting of question, as will be seen by referring to the almost innumerable cases of fraud with which our books are crowded.

The third ground raises the question of the validity of Wm. F. Pearson's assignment to the plaintiff of Barker's assignment of Farmer's Inn, accompanied by the assignment of the judgment and *ca. sa's.* It would be enough here to concede that Barker's assignment of Farmer's Inn, under the prison bounds' Act, vested in Wm. F. Pearson the legal estate. For, in that event, it was an estate in land, which, to be legally conveyed in this State, must be evidenced by a deed, executed in the presence of two witnesses. *Alston* vs. *Thompson,* (1 So. Ca. Rep. by Cheves, 271.) A short assignment of an assignment, conveys nothing, but wanting the requisites of being under seal and witnesses, (if it were even otherwise sufficient,) it cannot have the effect to pass land. It is a great deal more like the instrument in *Cline* vs. *Black,* (4 McCord, 431,) than it is like a deed. In that case, a nonsuit was ordered, because the instrument was not under seal, and could not, therefore, pass land. In the Court of Appeals, my brother Johnson said, with great truth, "Upon the whole, I scarcely recollect a case in which there were so many well founded objections to the plaintiff's recovery." The same might, I think, be very well said of this part of this case.

But, I think, the true view of an assignment under the prison bounds' Act, is not that it vests the assignor's estate absolutely in the assignee, but that it operates as a mere authority to him to enter upon, recover, sell and convey it, in satisfaction of the debt. The words are that the "judge, justice, or commissioner of special bail, before whom the prisoner shall be brought, shall order an assignment of the prisoner's estate, and effects mentioned in the schedule, to be made to the plaintiff, subject, nevertheless, to all prior incumbrances; whereupon the creditor, if necessary, may take possession, and if necessary, *sue in his or her own name for the recovery thereof." These words, without stopping [*377 to comment upon them particularly, plainly import a mere authority, (if necessary to be exercised,) to take possession and sue for the recovery thereof. Stopping there, possession taken under the assignment, would be merely satisfaction of the debt. (5 Stat. at Large, 79.) But the fifth section provides, if the property mentioned in the schedule "should prove deficient, any other property which the prisoner may have, or thereafter may acquire, shall be liable." This shows that it was intended that the creditor should ascertain the money value of the property assigned; and no better mode can be resorted to than a sale, and the application of the proceeds in satisfaction of the debt. The assignee's power over his debtor's estate assigned, is the same in most respects with that of the sheriff under execution. He has the right to enter, sell, and convey, in satisfaction. This was, however, not done here. The assignment of an assignment under the prison bounds' Act, is the assign-

ment of a power which can have no effect whatever. The assignment to Pearson was not carried into legal effect. He suffered Farmer's Inn to remain in the uninterrupted possession of Barker, and his estate remained undivested, for the plain reason that the power which he had granted was not exercised. This view of it was taken by the parties themselves, for Jones, as Wm. F. Pearson's assignee, constituted P. E. Pearson his attorney, to sell and convey Farmer's Inn, and he accordingly sold it, purchased it for, and conveyed it to, his principal. This proceeding was illegal, and has not been attempted to be sustained in argument. But it shows that the parties claiming under the assignment did not suppose that it clothed them with the title to the land, but only with an authority to sell and convey.

The assignment of the judgments and the *ca. sa's.* cannot help to vest in the plaintiff an estate which he has not otherwise acquired. They would only support his title, if it could be legally deduced from them. But here, when Pearson did not act under his assignment, the assignment of the judgment and executions, when the assignment of the assignment was made, may go far to show that the title of Barker was not intended to be divested, but to be so covered up with incumbrances that it could not be reached by his other creditors.

*378] *This brings me to the first ground, which supposes that the Judge below erred, in submitting to the jury the question whether Jones's title was, or was not, fraudulent. From what has been already said, it is plain that Jones cannot connect himself with Pearson's title under the assignment, whatever it may be. But when it is remembered that Pearson, under his assignment, had no title to the absolute estate, but that he had a mere power to enter upon Barker, and sell and convey "Farmer's Inn," in satisfaction of his debt, and that no such entry was made, there is, it seems to me, an end of all pretence on that score. But, I go further: the jury might well conclude, from the relationship between Jones and Barker, from the conveyance to the former of the whole of the personal estate and interest of the latter and his wife, that the debts to Pearson were really paid by Jones, out of Barker's funds, and the assignments were made as a cover to protect the property against creditors.

But the true view is to put Pearson's assignment out of view, and to look to the plaintiff, Jones, as standing on Barker's acknowledgment of tenancy. To give that its strongest effect, it is only an admission by him of Jones's title; and standing by itself, in a question of fraud, it could not certainly claim to stand on higher grounds than his deed. Looking to it, it furnishes evidence that at or before its date, the debtor, Barker, had conveyed Farmer's Inn to Jones; the question can then well be made by a creditor, whether the conveyance is not void by fraud.

To enable the jury to decide this question, the following facts had been proved, to wit: 1st. That Barker, from the day on which he purchased the place called Farmer's Inn, to the day on which it was sold by the sheriff, had remained in the undisturbed possession. 2d. That Jones was his brother-in-law. 3d. That to him Barker and his wife had conveyed all his and her estate, property and interest. To them the attention of the jury was directed, and they were told, that if they satisfied them that Jones's title was a mere cover to protect Barker's property from the

claims of his creditors, then they might find for the defendant; otherwise they must find for the plaintiff.

This was submitting the question of fraud, as one of facts merely, to the jury, and it would be strange to say that the *matter which belonged appropriately to them, should be withheld from them. [*379 And it is still stranger that the plaintiff should complain of error, when the question of fraud is put to the jury as a fact, which is the most favorable way in which it could be put for him.

The motion is dismissed.

RICHARDSON and EVANS, JJ., concurred.

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*The following case was decided at Charleston, February, 1841, but the copy did not arrive in time for it to be printed in its proper place. [*380

THE ORDINARY OF CHARLESTON *vs.* BENJAMIN F. HUNT.
THE SAME *vs.* WILLIAM SWIFT.

A creditor may sue upon an administration bond, without citing the administrator to account before the Ordinary, or obtaining a decree against him.

In such case, it is necessary to show, that the demand has been established against the estate; and that assets came to the hands of the administrator sufficient to pay it, which have been wasted or misapplied.

A judgment at law against the administrator for the original demand, with a return of *nulla bona* on execution, together with proceedings in Equity, to which the administrator was a party, and by which it appeared that assets had come to his hands sufficient to pay the demand, but which he had applied to the payment of debts of inferior degree, are sufficient to entitle the creditor to recover from the securities.

Before EARLE, J., at Charleston, May Term, 1839.

This was an action of debt upon an administration bond, against the defendants, as securities of William T. Raynal, who was the administrator of William Rouse, deceased. Plea, performance.

After proof of the bond a judgment was offered in evidence, in favor of Sanders Glover, (for whom this action was brought,) against Raynal, as administrator of Rouse, signed 11 February, 1832, on which an execution had been returned *nulla bona*. Certain proceedings in equity were then introduced, consisting of a bill, filed by the heirs at law of William Rouse, against Raynal, for a partition of the real and an account of the personal estate; the answer of Raynal, and the subsequent reports and orders. Among these was a decretal order of 22d May, 1830, directing a sale of the real estate, and an account of the personal estate. The commissioner was directed to take an account of the debts of the intestate, which should be rendered within a year, and after making provisions for the payment of them, to report the amount in the hands of the

administrator for distribution. On 21st May, 1831, he reported the sale of the real estate, and that the personal assets amounted to the sum of
*381] $4230 50, *and the disbursements to $3278 48, leaving a small balance in the hands of the administrator; that from the sales of the real estate, he had retained, to pay debts, the amount of $3766,67, that sum being regarded by the administrator, and the other distributees, as fully adequate to meet them. On the 7th May, 1832, the commissioner made an additional report, that bond debts had been established against the estate of Rouse, to the amonnt of $5349 54; that the amount retained to meet them, with the interest accrued, was $4224 50, leaving a deficiency of funds of $1125; that the debts paid by the administrator out of the personal assets, were all simple contracted debts, and that he had due notice of the bond debts. It was in evidence that written notice of Glover's debts was given to the administrator, on 27th January, 1830, at which time his own return exhibited assets in his hands, to the amount of $3000, which he proceeded to pay over to simple contract debts. These reports were confirmed, and under the several orders made in the cause, the commissioner distributed the fund retained out of the sale of the real estate, among the bond creditors, of whom Glover was one, and when the fund was exhausted, there remained due to him a balance of $818 60, for which, with interest, this action was brought against the securities, Raynal having left the State in 1834.

A motion for a nonsuit, on several grounds, was overruled, and the plaintiff had a verdict, which the defendants now moved to set aside, and renewed their motion for a nonsuit, mainly on the grounds taken below, —that the administrator was not cited to account before the Ordinary, and there was no decree against him, either by the court of Ordinary, or the court of Equity, to entitle the plaintiff to recover against the securities. It was likewise urged, that there was no sufficient evidence of a devastavit, as the administrator had applied the personal assets to the payment of debts, although of inferior degree; and the court of Equity having undertaken to make provision for the payment of the bond debts out of the real estate, it was the fault or laches of the plaintiff, that he did not secure his debt; and the securities of the administrator were no further liable.

*382] *Curia, per* EARLE, J. From the number of cases in our *books of reports, arising out of the liability of administrators and their securities, one would suppose that a new point could hardly arise. Yet I think there are some errors prevailing among the profession on this subject, as I think there are some ill-considered *dicta* scattered through the cases. One of these is, that no action at all can be maintained on the administration bond, against the securities, until the administrator has been cited before the Ordinary to account, and there has been a decree against him. A creditor of the estate has no claim to go before the Ordinary for an account; nor has the Ordinary any jurisdiction to decree the payment of his debt, or to make any decree that would avail him in the collection of it. When the suit on the bond is for the heirs at law or distributees, an account before some tribunal is necessary, in order to ascertain for what sum, after the payment of debts, the administrator is

liable. A creditor suing on the bond, has only to establish his debt against the estate of the intestate, and show that assets have come to the hands of the administrator, sufficient to pay it, which have been misapplied. The conclusion of the Court, in the *Ordinary* vs. *Jones*, (4 McC. 113,) is, that "no action should be had upon the bond, until by a proper course of proceeding, the claim of the creditor be established, and it be ascertained that there are assets sufficient to pay his demand, or a *devastavit* be clearly and formally established against the administrator."

The evidence in the case before us, comes up to the requisition of the rule thus laid down. The demand of the creditor was established against the estate of Rouse, in the action at law against the administrator, in which there was a verdict for the plaintiff, after full defence, and on full proof. Had the plaintiff proceeded to suggest a *devastavit*, and furnished the evidence which was produced in Equity, or exhibited the proceedings, he must have had judgment *de bonis propriis* against the administrator, which would have fixed the securities, in a subsequent action against themselves. And it seems to me, that the only inquiry to be made is, whether the proceedings in Equity furnish sufficient evidence, that on accounting, under the decree of that court, for the personal estate, the administrator had assets to pay the demand claimed of him, and that he wasted them or misapplied them. The suit there was instituted by the heirs at law, for partition of the real, and an account of the personal, estate. A portion of the bond *creditors, and among them [*383
Glover, for whom this action is brought, interposed a claim to be paid out of the real estate; and upon taking the account of the personal estate, it appeared that assets had come to the hands of the administrator, sufficient to pay Glover's debt, which he applied to the payment of simple contract debts, after notice. This was a *devastavit* in him, which makes the securities liable. All the persons interested in the estate, were parties to that proceeding; which was in effect beneficial to the securities: for whatever was received by the creditors out of the sales of the land, diminished their liability to that extent; and they have very little reason to complain that they are only made liable for the balance. That the creditors resorted to Equity to obtain payment out of the land, in no degree lessens their claim to proceed at law against the administrator or his securities. And without giving effect to the report, confirmations, and orders in Equity, as *res judicata*, establishing a *devastavit*, the other evidence before the court below was enough for that purpose. The written notice of Glover's debt was served on the administrator, the 27th January, 1830; and his account filed with the Ordinary, exhibited an amount of three thousand dollars, then in his hands, and paid, subsequently, to simple contract debts. This, with the return of *nulla bona* on the execution against the administrator, abundantly establishes the *devastavit*. The administrator has not performed his undertaking, faithfully to administer the personal assets. And the failure of the creditor to obtain the whole of his debt out of the real estate, is no defence to his action against the securities, who are justly liable, upon the same proof which would have been sufficient against their principal. There is no pretence for the charge of laches against the creditor, admitting that to be a valid defence; although it would not be, for he gave timely notice

of his demand; and both the personal estate was exhausted, and the land sold for partition, before he obtained judgment. That a sufficient sum was not retained to pay all the bond debts, was not the fault of the plaintiff, but of the administrator, and the heirs at law.

The judgment of the Circuit Court is affirmed.

The whole Court concurred.

Hunt and *Thomson*, for the motion. *Grimke*, contra.

See Sup. 100; 7 Rich. 179; 3 Bur. 530; *Wiley* vs. *Johnson*, 6 Rich. 358. *An.*

CASES AT LAW

ARGUED AND DETERMINED IN THE

COURT OF ERRORS OF SOUTH CAROLINA.

Charleston, February, 1841.

JUDGES OF THE COURT OF ERRORS.

HON. DAVID JOHNSON, Chancellor.
" RICHARD GANTT, Law Judge.
" JOHN S. RICHARDSON, Law Judge.
" JOHN BELTON O'NEALL, Law Judge.
" WILLIAM HARPER, Chancellor.
" JOSIAH J. EVANS, Law Judge.
" BAYLIS J. EARLE, Law Judge.
" JOB JOHNSTON, Chancellor.
" ANDREW PICKENS BUTLER, Law Judge.
" BENJAMIN F. DUNKIN, Chancellor.

James Murray *vs.* South Carolina Railroad Company.

The Railroad Company are not liable to one of their agents for an injury arising from the negligence of another competent agent.

Before O'Neall J., Barnwell, July Extra Term, 1838.

This was an action on the case, against the defendants, for an injury sustained in their service.

The plaintiff is a tailor by trade. He resided at Aiken, and applied to Capt. Robertson, the agent of the company, for employment. He declined employing him, on account of his intemperate habits and consequent rashness. He, however, went on to Charleston, and was employed as a second fireman, *on the 18th of May. He selected the [*386
engine and engineer to which he was to be attached and under whom he was to serve. William E. Perry was the engineer. About the 27th of May, 1837, the plantiff's second or third trip, as the engine was ascending the road from Charleston, near the Four Hole Swamp, just before entering an excavation, and within about three hundred yards of it, one of the witnesses (Johnson, the first fireman,) said he saw a horse

standing near the commencement of the excavation, within ten steps of the road, feeding slowly towards it: he touched the engineer on the back, and asked him if he saw the horse; he made no reply: the engine ran on: the plaintiff said to the engineer, "stop we are in danger:" the engine still proceeded, until within fifty or sixty yards of the horse: this witness said he then put his hand on the "escape steam valve," and told the engineer again to stop, for there was danger of running over the horse, and pointed towards him: he, the engineer, then shut off the steam: by this time the horse stepped upon the road, and there stood: the engine with the steam shut off, ran within six or eight feet of the horse: the engineer gave her all the steam she could carry, to carry her as quick as possible, and with the least danger, over the horse. At this moment, this witness took hold of the awning post, and swung himself outside the engine, for the purpose of jumping off on the left hand side of it: in this position he could see under the engine, which struck and ran over the horse: as it left the road on the right hand side, the witness jumped off on the left. His post was on the left, and the plaintiff's on the right, of the engine: the break to stop the engine was on the right, and nearer the plaintiff than the witness: when the engineer shut off the steam, the brake was not let down: (he said he was too much agitated by fear to think of the brake:) had it been let down, the engine might have been stopped. As the engine left the road, the plaintiff's leg dropped between the foot board of the engine and tender, and as these two came violently together, when the engine stopped, his leg was crushed, and his thigh was afterwards amputated midway. This witness gave it as his opinion, very distinctly, that the accident might have been avoided, and resulted from the carelessness of the engineer, in not stopping the engine as soon as cautioned: he thought that as the engine
*387] was running only at the rate of ten or twelve miles per *hour, it might have been stopped before they reached the horse. He said it was not the fireman's duty to let down the brake, unless ordered by the engineer. Meredith, the conducter of the train, said, just as they emerged from an excavation, he saw the horse about fifteen yards from the road, moving from behind some bushes, and running in an oblique direction towards the road, and in the direction the engine was pursuing; he ran thus about twenty yards, when he leaped upon the road between the rails, just at the entrance of another excavation: as he did so, the engine struck him, and passed over him, and was thrown off the track. The engine was running from sixteen to twenty miles an hour From the time this witness saw the horse, he said that he thought the only way to avoid him was to outrun him. He said, that to stop the engine, it is the duty of the engineer to shut off the steam, and the firemen to let down the "brake;" it is, however, the engineer's duty to order the fireman to let down the brake. Perry was proved to be a skilful professional engineer. The witnesses, Robertson and Ross, concurred in saying, that it was the duty of the engineer to shut off the steam, and the fireman to let down the brake, (and that was the particular duty of the second fireman) whether ordered by the engineer or not to stop the engine and prevent any accident. About three hundred feet is as short a space as within which the engine can be stopped, when running at the average rate of fifteen miles an hour.

The jury were instructed, that the plaintiff's service subjected him to all the ordinary risks and perils of the employment. Each officer of the company, as to strangers and inferiors, was to be considered as the company; and every command or act given or done by him, must be regarded as given or done by the company themselves. If a superior officer had given an order to an inferior, to do an act not necessary to be done, and not within the duty of the inferior, and in doing it, injury resulted to the inferior, then the company would be responsible. If, in running the road, a superior officer (the engineer) did his duty so carelessly as to subject a servant of the company to unnecessary danger, and which the servant could not avoid, then the company would be liable. But if the peril, from which the injury resulted, was unavoidable, or if the engineer did every thing ordinary prudence* suggested, to avoid it—and, notwithstanding, a servant sustained injury, it would be one of the [*388 risks to which his contract of service subjected him, and he could not recover. So, too, if the servant, (the second fireman,) did not do his duty, and to its neglect (as not letting down the brake) the injury might be fairly ascribed, then, in that case, his injury would be attributable to himself, and he could have no redress against the company.

The facts under these instructions, were submitted to the jury. I thought, and still think, there was very little proof to justify a verdict, but still that little may sustain the verdict, $1500, found by the jury for the plaintiff.

The defendants appeal, on the annexed grounds.

GROUNDS OF APPEAL.

1. Because the plaintiff, being a fireman actually employed on the car to which the accident occurred, cannot recover against the company in whose service he was.

2. Because the ordinary risks of the occupation of the plaintiff are to be sustained by himself, and the accident was the result of such risks.

3. Because the plaintiff himself was partly in charge of the car to which the accident occurred, and might have prevented it himself, by the timely discharge of his own duty.

4. Because the plaintiff, being a tailor by trade, imposed himself upon the company as a fireman, and the accident is attributable to his own negligence and want of skill.

5. Because it was clearly proved, that there was no want of skill or diligence on the part of the engineer, or other servants of the company.

6. Because the accident itself was unavoidable, and the verdict is contrary to the evidence in all these particulars.

COL. BLANDING'S ARGUMENT.

It is of the utmost importance that the principle of the case should be settled correctly; not so much on account of the railroad, as of the public in general. The company can make its contracts with its servants so as to avoid liability, if this verdict should be sustained. But this cannot be so easily done by others who come within the same principle. That principle, as contended for by the plaintiff, I take to be this: *that wherever an individual or company of [*389 individuals employ several persons to effect any operation, the mismanagement of one of those persons, during the operation, by which another of them is injured, will subject the employer to damages at the suit of the injured person. This the defendants deny, and contend that wherever a company (or individual) employs several persons to effect, by a joint effort, any business, each person so employed takes on himself all the risks of the service which do not result from the mismanagement or improper conduct of the company itself, and each servant

agrees to take on himself the risk of all injuries to result from the mismanagement or negligence of the other servants of the company engaged in the same undertaking. To illustrate this view of the subject, let me state our views a little more fully. The company are supposed to warrant that the service is not a more dangerous one than it appears to be. Thus they are supposed to warrant that
*390] the road is in ordinary repair; that the engine is a good one, and that *the engineer is competent. And if this is not true, to the knowledge of the

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JAMES MURRAY *vs.* THE RAILROAD COMPANY.

The evidence of William Johnson, witness for plaintiff.

The witness being sworn, says he was present, and in the employment of the defendants, at the time plaintiff had his leg broken. It was about the last of May, 1837. It happened about thirty-four miles this side of Charleston, near Four Hole Swamp. The witness was the first fireman, and his position was on the engine. The engineer, the plaintiff, and the witness, were on the engine together. They ran on very well till they got to the Four Hole Swamp. When they had got within about three hundred yards of being out of the swamp, the witness saw a horse standing by the side of the road, in the edge of the swamp, and near the commencement of the excavation. As soon as he saw the horse, he asked the engineer if he saw the horse—the engineer made no answer. They ran on, approaching the horse, and the plaintiff said to the engineer, stop, we are in danger. They ran on a piece further, nearer the horse, within fifty or sixty yards of him, when the witness put his hand to the steam valve, and told the engineer to stop again, for there was danger of running over the horse. The engineer then shut off the steam. By this time, the horse stepped upon the road, and there stood—the engine, with the steam shut off, ran within six or eight feet of the horse. Before, however, the engine got that near the horse, the witness took hold of the awning post, and swung outside of the engine, with one hand on the awning post, and one foot on the foot-board of the engine, in a swinging position, for the purpose of jumping on the left hand side of the engine. The witness could see the front wheels, by looking under. As soon as the engine struck the horse, it knocked him down, his fore legs on one rail and his hind legs on the other. As soon as the hind or driving wheels struck the horse, the engine bounded up, and the witness sprang off on the left side, and the engine ran off on the right side. When the witness jumped off, the engineer was on the right hand side of the engine; the plaintiff was standing between the witness and the engineer, a little back, on the foot board of the tender. As the witness struck the ground, he rolled over and over twice, and got up, and went to see what had happened. The engineer asked him if he was hurt, he said no—and asked if any of them (the engineer and plaintiff) were hurt; the engineer said no—the engineer then turned to plaintiff, and asked him to hand a bucket of water to put out the fire—the witness ran round the head of the engine, and as he got round he heard the plaintiff say his leg was broken. Witness thinks if the engineer had tried to stop the engine, when he (the witness) first showed him the horse, he might have avoided the accident. The witness had seen the engine stopped within a shorter distance. The horse was not running. *The witness is decidedly of the opinion that the accident was occasioned by the negligence of the engineer*—thinks the engine was not going over ten or twelve miles an hour, and therefore thinks the engine could have been stopped. When the engine got within six or eight feet of the horse, the engineer gave her all the steam she could take. Edward Perry was the engineer. They had taken in water once at Summerville, in the thirty-four miles—they had not taken in any wood. It was either half-past eight or half-past nine o'clock. Witness thinks wood ought to have been taken in at the nineteen mile post. It was the practice of the engineers to take in water at the twelve mile post, at Summerville, and at Inabinet's, thirty-two miles from town, if required. The distance, however, could be run very easily from Summerville to Ross' Turn Out, three miles above where the accident happened. Witness thinks Perry came out from New York as a professional engineer.

Cross-examined—The witness says he had been about two months in the service of the company as a fireman, when the accident happened, and in company with

company or their chief agent, and the danger is thus greater than the servant had a right to expect, and from that cause he receives an injury, it would seem rational that the company should be liable. But the company cannot be supposed to warrant that each servant of the company shall always be watchful, and

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Perry about two weeks; it was the second or third trip the plaintiff had made as fireman in the service of the company; the witness and the plaintiff were receiving a dollar a day as firemen. From the time the witness saw the horse till the accident happened, the engine passed through no excavation; when the witness first saw the horse, he was standing, feeding on the right hand side of the road, about ten steps from it, and moving slowly towards the road; when witness asked the engineer if he saw the horse, he touched him on the back; the engineer turned round, but said nothing; the witness pointed towards the horse; when the engineer shut off the steam, the brake was not let down; the engineer gave no orders to let down the brake, which he generally does; the brake was on the right hand side of the tender, and nearer to plaintiff than to witness; had the brake been let down when the engineer shut off the steam, the engine might have been stopped. The witness was too much agitated with fear at the time to think of the brake. If the engineer had told the plaintiff to let down the brake, the witness could have heard it. It was not usual with the witness to let down the brake unless ordered by the engineer. When witness first saw plaintiff after the accident, he was standing holding to something; did not say he was hurt, till he attempted to get the water. His leg was broken between the foot-board of the tender and the foot-board of the engine, by the former running under the latter; is not certain whether they took in water at the station twelve miles from Charleston or not, but does not think they did; is not certain whether they had wood sufficient to carry them to Ross's or not, but is certain they had water enough; the wood was picked, and was nothing but chips and trash. The engine made steam very easily. Thinks the engineer's intention in giving steam to the engine within six or eight feet of the horse, was to go over the horse quick, in order that the forewheels might strike the track on the other side. After they saw the horse, witness heard the plaintiff tell the engineer to stop, for they were in danger. The engineer said nothing from the time the witness saw the horse till the accident happened.

In reply—There were men on the road while the witness was there, who commenced as firemen, acting as engineers, viz.: Alfred Weed, Thomas Kingdom, and William Gillespie. About a week before the accident, Perry ran over a cow, which in the opinion of the witness might have been avoided. The business of a fireman is only dangerous when the engineer is not careful, or when unavoidable accidents happen. Coming out of the Four Hole Swamp there had been an excavation, but the dirt had been carried off. He would not consider it his duty to put down the brake, unless told to do so by the engineer. It was the first time he spoke to the engineer about the horse, he put his hand on his back.

Sworn to before us:

A. PATTERSON,
A. P. ALDRICH.

The testimony of WILLIAM C. MEREDITH, *taken by consent, for defendants.*

The witness being sworn, says:—That he was the conductor of the train of cars, on or about the 27th May, 1837, when an accident occurred on the railroad, near the Four Hole Swamp. The locomotive and tender were thrown off the road. The accident happened in this way:—after passing through an excavation, the witness saw a horse about fifteen yards from the road, moving from behind some bushes, running in an oblique direction towards the road, and in the direction the cars were going. The horse ran thus about twenty yards, when he leaped between the rails of the road, just at the commencement of another excavation, and where the rails were even with the ground, or what is call a surface road. As the horse leaped between the rails, the engine caught him, ran over him, and was thrown off the track, as above mentioned. The witness was, at the time, standing on the foot-board of the hindmost car, when he first saw the horse, and until the engine

that no servant shall be injured by the negligence of another. Now, if this be not the true doctrine, some case can be found where the employer has been made liable at the suit of one servant for the negligence of another, by which he has been injured. These accidents have been numerous. They have for ages been

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was thrown off the road—on the same side the engine was thrown off, and on which the horse approached the road, and saw distinctly what he has stated. There were from seven to nine cars in the train, and where the witness stood, was from one hundred and ten to one hundred and fifty feet from where the engine stood, and the train was moving at the rate of from sixteen to twenty miles an hour—the train was on ground a little ascending. To check the engine, it is the duty of the engineer to close the valve, and duty of the fireman to let down the brake—the witness was not in a position to see whether this was done, but thinks the valve was not closed till the horse crossed the road. When the witness first saw the horse, he thought the only chance to avoid coming in contact with him, was to out run him, and was of that opinion till the collision took place. The witness does not know whether the brake was down. Mr. W. E. Perry was the engineer, and Wm. Johnson and the plaintiff were firemen. The witness does not know when the engineer first saw the horse. At the time the accident occurred, the plaintiff was standing, either in the tender, or on the foot-board of the engine; that was his proper place. The plaintiff was not a passenger, he was in the service of the company as a fireman.

Cross-examined.—The witness says, the engineer might have seen the horse sooner than he did. The position of the engineer was a foot, or a little more, higher than that of the witness. The witness thinks, if the engineer had seen the horse one hundred and fifty feet sooner than he did, he might have so retarded the engine, as to have permitted the horse to outrun it. The hollow between the two excavations, is from sixty to one hundred yards wide. The horse might, by leaping both rails, have crossed the road from five to ten yards before entering the excavation. In the deepest part of the hollow, the rails are not more than three feet from the ground; the distance the engines at that time were instructed to go, was not to exceed fifteen miles an hour, as near as could be made. Thinks it was possible for the engineer to have seen the horse before he got out of the first excavation. The engineer has the control of the firemen. If the engineer wishes to stop the engine, he must tell the fireman to let down the brake. It is easier to stop the engine on an ascent, than on a descent. At the speed the engine was going at that time, and at that place, she could not have been stopped under one hundred yards. She could not have been stopped between the two excavations, but she might have been so retarded, that the horse might have avoided it. The valve was not closed till the horse crossed the rail. Perry was said to be a professional engineer; he ran very well to the place the accident happened. The witness did say that he would not go on the train when Perry was the engineer; the witness said this, because he thought Perry ran faster than he ought to do, over certain parts of the road; did not think he had been long enough on the road to be safe. He appeared to be cautious enough; heard of his having run over a cow. Mr. Perry took in wood twice between Charleston and the place where the accident happened; the distance is about thirty-four miles. It is not usual to take in wood and water at each station. The witness cannot attach blame to any person for the accident, from the facts coming within his knowledge. If Perry saw the horse time enough to stop, he was to blame; but whether he did see the horse in time, the witness cannot say. The engine was good—first rate.

In Reply.—The witness acted as a conductor twenty-one or twenty-two months. If an engineer is attentive to his duty, he has not much time to look around, or notice objects on either side of the road. It is his duty to notice the road ahead, and the machinery.

The witness thinks there was wood enough aboard to carry the train to the next station. As to water he cannot say, as he knows nothing, as the water pipes were broken off.

Sworn to before us: A. PATTERSON,
A. P. ALDRICH.

of daily occurrence. The blacksmith, the carpenter, the ship owner, in fact, in every occupation, where a joint effort is required to perform any piece of business, the employer intrusts many to effect it; and every day it happens that some one of them is injured by the negligence of another. Yet no case can be found where it was ever imagined that the employer *was liable for such an injury. [*391
And this would seem to put the question to rest. For no reason can be assigned why a railroad company should be subject to a rule which does not apply to every company or individual who engages many about the same business. If no sailor ever recovered against the owners, for an injury occasioned by the negligence of the master, mate, or other sailors; if one journeyman blacksmith never recovered against his employer for a burn by the carelessness of his co-journeyman; or if no instance can be found where, in all the various avocations of life, the principal has been held liable to any of his agents for an injury by his co-agent, it may be well asked, why a railroad company should be made thus liable.

The principle, as applicable to these cases, where one man or a company is to be made liable for the act of another person, is this: that no one shall be liable for another's act, except he has commanded it, or "has agreed to be so liable; or where such liability has been imposed on him by law, from principles of policy, or for the public security."

*Now, it will hardly be supposed that in this case the company can be [*392
charged with an express or implied command to break the plaintiff's leg, or that the company ever *agreed* to be liable for the act. If they are liable at all, it must be on principles of policy, or for the public security.

Now, let us see how far the public security would be promoted by making the company liable to all its servants for injuries they may sustain by the negligence of their co-servants. The public security requires that every possible motive should be held out to every person engaged in running a train of cars, to use the utmost care; that each should see that every other person engaged in the service does so; that every other person is competent to his post, and that the road, engine and cars are in safe order. Whatever principle is best calculated to secure to the public all this, is that which the Court should adopt. If this will be best promoted by making each person engaged in running the train risk all injuries he may receive, without resort to his employer, then he should be excluded *from such resort. If want of such resort would make him more careful [*393
himself, make him urge others acting with him to more care, would induce him never to act but with those whom he knows to be competent, prudent, and careful, it is believed that the public would find security in it. Now, it is very certain that where he is denied all recourse, he will risk less than where he expects a pension for life, or a sum in gross, for any injury he may receive in the service.

This view of the case, it appears to me, is sufficient to establish the rule, that every person who enters into the service of a railroad company takes upon himself the risk of all injuries he may sustain from the ignorance of the servants of the company who are engaged in conducting the train of cars, and that the security of the public requires the adoption of this principle.

If, in ordinary joint efforts, when only the interest of the company is concerned, no case can be found where it has been decided that the principal shall be liable to one of his *servants for the negligence of another, how much stronger is [*394
the reason for adopting the same rule in this case, where the safety and life of passengers are promoted and secured by it, and where a different rule would greatly diminish that security.

Let us compare the case of the injury sustained by a servant of the company, from the negligence of its agents in concert with him, with the case of injuries received from similar negligence by strangers, passengers, or freighters.

The liability of the company for the loss or damage to goods it takes to carry, is founded on principles of public policy. As common carriers, the company is liable for all losses, except from the act of God, or the enemies of the country, even when there is no negligence, and the principle in that case has no analogy to the one before us.

In case of injury to passengers, the rule is different, and the company is liable

for all injuries to them which arise from any negligent act of the agents of it. The difference in that *case from ours is most striking. The passenger *pays* *395] the company for carrying him. The agent or servant is paid by the company. The passenger has nothing to do in running the train, and if he should interfere, he would not only lose his claim on the company, but might be made liable to it in case an injury should happen. The agent or servant is bound to act, and act faithfully, and to see that others engaged with him do so; or at least is bound to inform his employers, if he sees negligence in others. The passenger can know nothing of the condition of the road, or works, or machinery, and has to trust for his security to his right to recover damages if he is injured. He has no information as to the competency, skill, or prudence of those who drive the train. But, on all these matters, the agents or servants of the company may be informed before they enter the service. With such a difference of information, and condition, it would be extraordinary if the same principle should apply to both. If the company, then, are liable to the passengers only for the misconduct *396] or negligence* of its agents, what is the extent of its liability to its servants for injuries sustained in conducting the train? Not for such as result from negligence or misconduct of those with whom they act, but simply, as I have before stated, for such injuries as they sustain from being placed in a more dangerous service than that on which they agreed to enter. If the servant has been deceived by the company as to the nature of the service, and is injured, the company would be liable. As to the competency or care of those with whom he acts, he has the same means of information that the company possesses, and oftentimes much greater; and when the persons who are to conduct the train enter on the service, policy requires that they should be sureties for each other; so far, at least, as to exempt the company from any responsibility for injuries which one may receive from the carelessness of another. The rule as to sailors goes further than this. The owners of the ship are not liable to the sailors for injuries they may receive in the service, howsoever they may happen; but if the ship is lost, they forfeit their wages, nor can they recover them but on full proof that the loss was occasioned by the negligence of the master. To save this forfeiture, they may prove negligence in the agent of the owners, but there has never been a case in which it has been permitted to show such negligence to charge the owners with any injury the sailors may have received from it.

But it may be said that the rule which applies where a stranger is injured by the agent by a negligent performance of his service, should be adopted. Here, the rule is, that a wilful act by the servant, by which a stranger is injured, will not charge the master or employer. The act must be done strictly in performance of the service of the principal, or he is not liable, for he cannot be presumed to have ordered any other. And the rule is carried very far, where the principal is presumed to have ordered his negligent acts. But the rule is not, perhaps, founded on such presumption, but on the principle that the public security requires that the employer, having engaged the agent, and placed him in a situation where his negligence may cause injury to others, shall respond to the person injured, and not leave him for redress to one who is wholly irresponsible. It can be sustained on no other principle. Now, how far does this rule apply to our *397] case? The co-servant* who may be injured is employed to act with the person from whose negligence the injury has arisen. He chooses his situation, and with whom he is to act. They are all employed in a common cause, and must share the common risk. They must look to each other for protection and safety, and be thence induced to stimulate each other to care and diligence, and prevent, by the efforts of one, the consequences of the negligence of another. On this the public security depends, and it would be greatly endangered were a different principle adopted.

Let us consider the case in one other respect. When an injury of this kind has happened, there will always be a conflict of testimony as to the nature of the act that occasioned it. Was it the result of a mere mistake of judgment, of sheer neglect, or of wilful mismanagement; or, by whom was it caused, and the share of participation each had in it? The agents of the company are the witnesses, and in such a conflict there is great danger that every accident, even when occasioned by the party injured, will be visited on the company. In this case, the

evidence is as strong that the negligence of the plaintiff, in not putting down the brake, was the cause of the accident, as that it was owing to the negligence of the conductor of the train. On principles of policy, this investigation should never be allowed, where an injury has been sustained by one who is bound in common with others to prevent the accident by which it was occasioned. And this can be done only by this Court declaring that every person who engages to unite in conducting a train of cars, takes upon himself the risk of all injuries which may result from the negligence or misconduct of those with whom he is united in that service.

If this view of the case be correct, the inquiry is ended, and the Court may grant a new trial or a nonsuit, for the right of the plaintiff to recover is defeated on his own showing.

But if I have mistaken the principle, and among the risks against which the company warrant, is, that no person engaged in conducting a train shall be injured by the negligence of another in the same service; yet, the testimony will not support the verdict. The whole occurrence took place in less than ten seconds. What was the most proper course to be pursued in such an emergency, was one of doubt and uncertainty, on which an immediate decision was to be made. The conductor *of the train decided, and the injury happened. Now, if the [*398
Court, on reviewing the testimony, cannot discover that there was sufficient evidence to warrant the jury in saying that the conductor decided wrong, not merely as a mistake of judgment, but from a negligent disregard to his duty, a new trial must be granted. For without such evidence, on no principle can the company be made liable.

Curia, per EVANS, J. In the consideration of the question involved in this case, I shall assume that the verdict establishes the fact that the plaintiff's injury was the effect of the negligence of the engineer, and then the question arises whether the railroad company is liable to one servant for an injury arising from the negligence of another servant. The business of the company is the transportation of goods and passengers. Its liability in these respects, is, in general, well defined and understood by the profession; and if the plaintiff's case came within any of the principles applicable to these cases, we should have no difficulty in deciding it. The application of steam power to transportation on railroads, is of recent origin, but the principle by which the liability of a carrier is fixed and ascertained, is as old as the law itself. There is nothing in the fact, that the defendant is a corporation, except that of necessity it must act altogether by agents. The liability is precisely the same as if the defendant was an individual acting by the agency of others. The principle is the same, whether you apply it to a railroad, a steamboat, a wagon, a stage coach, or a ship. If this plaintiff is entitled to recover, I can see no reason why the owner of any of the above modes of conveyance, should not be liable under the same circumstances. If the owner of a wagon should employ two men, one to drive and the other to load, and either of them should so negligently perform his work as to injure the other, the owner of the wagon would be liable. The principle will extend to all the vocations of life wherein more than one person is employed to effect a single object; and a new class of liabilities would arise, which I do not think has ever heretofore been supposed to exist. It is admitted, no case like the present has been found, nor is there any precedent suited to the plaintiff's case, unless he stands in the relation of a passenger to the company. In this point of view, his counsel has chosen to regard him, for I *understand the declaration alleges he was a passenger. [*399
Now, a passenger is every where spoken of as one who pays for

transportation. In all the operations necessary for this, he is passive. The moment he becomes an operator, for then his character is changed, he becomes the servant of the company, and not its passenger. It would be a confusion of terms so to regard him. He is no more a passenger than a sailor or a stage driver. There is nothing in the definition of bailment, or the classification of the different kinds of liability growing out of that relation, which applies to the plaintiff's case, and if he is entitled to recover, it must be on principles which apply equally to all operations of life in which agents are employed. There is no question that, in general, the principal is liable for the acts of the agent, performed in the execution of his agency, or in and about the business of his principal. Thus, the owners of a railroad would be liable to passengers for an injury sustained by the negligence of any of its servants, superior or subordinate, because it is implied in the undertaking to carry, not only that the road and cars are good, but that the servants employed are competent and will perform their duty. For the loss of goods, the law annexes a still greater responsibility. So, also, if one employ an agent to execute any work whereby an injury may result to a stranger, the law requires it to be done with care, and if a stranger sustain an injury, his principal is liable, as was decided in *O'Connell* vs. *Strong*, (Dud. Rep. 265.) But the plaintiff is neither a passenger nor a stranger, and if he can recover, it must be in his hermaphrodite character as a passenger fireman. In the cases above enumerated, the principal is represented by the agent, and unless he his liable, the great operations of life cannot be carried on—no man would have adequate security for his person or his property. The owner of goods would not trust them on a railroad, or a steamboat, if his only security was the liability of the mere servants employed. No passenger would commit his safety to a railroad, steamboat, or stage coach, if, in case of injury, he could look to none but the agents usually employed about these modes of transportation. So, also, no man would have any guarantee for the security of his property, if his only remedy for negligence was the irresponsible or insolvent agents which another might employ. In all these, and similar cases, the reasons
*400] of the liability of the *principal are clear, and the law books are full of cases or precedents which apply to them; but it is not so with the plaintiff's case; there is neither authority nor precedent for it.

It was said, in the argument, that if the engineer had been the owner of the road, he would have been liable. Of this I apprehend there would have been no doubt, but then his liability would have arisen, not from his being the owner, but because the injury arose from his own act. That he is now liable, seems to me to admit of no doubt. But it by no means follows as a consequence, that because he is liable, those who employ him are liable also. One acting as agent may subject himself to liability in a variety of cases, for which his principal would not be liable; and this may be as well in cases of contract as in cases of tort. The extent of the liability of the principal, for the acts of the agent, can, in general, be readily ascertained from the object of the contract, and the relative position of the parties. A passenger desires to be transported from one place to another; the carrier undertakes to do this, and is liable if he fails. It is wholly immaterial by whose default the injury resulted. There has been a breach of the contract, and he has a right to look to him with

whom his contract was made. With the plaintiff, the defendants contracted to pay hire for his services. Is it incident to this contract that the company should guarantee him against the negligence of his co-servants? It is admitted he takes upon himself the ordinary risks of his vocation; why not the extraordinary ones? Neither are within his contract—and I can see no reason for adding this to the already known and acknowledged liability of a carrier, without a single case or precedent to sustain it. The engineer no more represents the company than the plaintiff. Each in his several department represents his principal. The regular movement of the train of cars to its destination, is the result of the ordinary performance, by each, of his several duties. If the fireman neglects his part, the engine stands still for want of steam; if the engineer neglects his, everything runs to riot and disaster. It seems to me, it is, on the part of the several agents, a joint undertaking, where each one stipulates for the performance of his several part. They are not liable to the company for the conduct of each other, nor is the company liable to one for the misconduct of another; and, as a general rule, I would *say, that where there was no fault in the owner, he would be liable only for wages to his servants; and so far has this doctrine [*401 been carried, that in the case of seamen, even wages are forfeited if the vessel be lost, and no freight earned.

In the above observations, I have endeavored to confine myself strictly to the case before the Court. It is not intended to pre-judge other questions, which may arise between the company and its servants; nor do I mean to say, that a case may not occur where the owner, whether an individual or company, will be liable for the acts of one agent to another; but then it must be in such cases as where the owner employs unfit and improper persons as agents, by whose ignorance or folly another is injured. Upon such a case it will be time enough to express an opinion when it arises. The present is not such a case. The engineer, according to the evidence was competent, though he may have been rash in the particular instance in which the plaintiff's injury was sustained. He was known to the plaintiff as well as to the company, for it appears by the report that he selected the engineer under whom he was willing or prepared to serve. It seems to me the plaintiff is not, therefore, entitled to retain his verdict, and a motion for a new trial is granted.

Richardson, Earle, Butler, Harper, Dunkin, JJ. and CC., concurred.

Johnson, Chancellor. I concur in this opinion, and will only add a word in illustration of my own views of the question.

The foundation of all legal liability, is the omission to do some act which the law commands, the commission of some act which the law prohibits, or the violation of some contract by which the party is injured. There is no law regulating the relative duties of the owners of a steam car, and the persons employed by them to conduct it. The liability, if any attaches, must therefore arise out of contract. What was the contract between these parties? The plaintiff, in consideration that the defendants would pay him so much money, undertook to perform the service of fireman on the train. This is all that is expressed. Is there anything more implied? Assuming that the injury done, was in conse-

quence of the negligence of the engineer, the defendants would not be liable, *unless they undertook to answer for his diligence and skill. *402] Is that implied? I think not, The law never implies an obligation in relation to a matter about which the parties are or may, with proper diligence, be equally informed. No one will ever be presumed to undertake for that which a common observer would at once know was not true. The common case of the warranty of the soundness of a horse, notoriously blind, may be put in illustration. The warranty does not extend to the goodness of the eyes, because the purchaser knew or might have known, with proper care, that they were defective.

Now the plaintiff knew that he was not to conduct the train alone. He knew that he was to be placed under the control of the engineer. He knew that the employment in which he was engaged was perilous, and and that its success was dependent on the common efforts of all the hands; and, with proper diligence and prudence, he might have been as well, and it does not follow that he might not have been better, informed than the defendants, about the fitness and security of all the appointments connected with the train. If he was not, it was his own want of prudence, for which defendants are not responsible. If he was he will be presumed to have undertaken to meet all the perils incident to the employment.

There is not the least analogy between this case and that of common carriers of goods or transporters of persons. They are liable in respect to the price paid. Not so here. The plaintiff paid nothing for his transportation; on the contrary, he was to be paid for his labor, and for the perils to which he was exposed, as incident to his employment. No prudent man would engage in any perilous employment, unless seduced by greater wages than he could earn in a pursuit unattended by any unusual danger.

O'Neall, J., dissenting. This case was tried by myself, and although, had I been on the jury, I should have found for the defendants, yet there were certainly facts in the evidence, which might have led another to a different conclusion; and, therefore, I am not disposed to disturb the verdict. This makes it necessary to consider the legal doctrine which I laid down to the jury.

403] In substance, I held, that if the injury to the plaintiff resulted from the negligence of the engineer, then the plaintiff was entitled to recover. This doctrine, a large majority of my brethren think erroneous, and however much deference is due to their opinions, yet, as I consider them to be wrong, I think it my duty to state my own views.

This case is one of the first arising out of the conveyance of human beings by locomotives on railroads. It goes beyond the ordinary case of a passenger, and presents a claim on the part of a hired servant, against his employers, for an injury sustained in their service. If it arose out of any of the old-fashioned modes of conveyance, managed by the defendants themselves, could there be a doubt that they would be liable, if the injury resulted from negligence? Take the case of a stage coach, driven by the owner, and let it be supposed that the plaintiff was hired as a guard, and that he was injured in that employment, by the careless driving of the

defendant, who would hesitate to say that he was entitled to recover? No one who had a proper regard to legal principles.

Is there any distinction in law as to the effect which the employment of the plaintiff is to have, in the different kinds of service in which he may engage? I think there is none. If Mr. Tupper, the able and efficient officer of the company, had, in person, managed the engine, and the plaintiff had been injured by his carelessness, I would most respectfully ask, how could it be pretended that the company was not liable?

I admit here, once and for all, that the plaintiff, like any other servant, took, as consequence of his contract, the usual and ordinary risks of his employment. What is meant by this? No more than that he could not claim for an injury, against which the ordinary prudence of his employers, their agents or himself, could provide. Whenever negligence is made out as the cause of injury, it does not result from the ordinary risks of employment.

How far are the defendants liable for the acts of the engineer? In the language used in Bacon's Abridgment, Tit. Master and Servant, letter R., "it is highly reasonable that they should answer for such substitute, at least *civiliter;* and that his acts, being pursuant to the authority given him, should be deemed the acts of the master." Now, to this authority, it will not do to say the defendants did not authorize the engineer *to run his engine so carelessly as to injure the plaintiff. They put him in command of it, and authorized him with it to run [*404 the road. If, in the doing of this act, which is according to their authority, he acts negligently, then they are liable for the consequences, for they result from the doing of their business, by one then employed by them. The cases of *Drayton* ads. *Moore*, and *Parker & Co.* vs. *Gordon*, (Dudley's Rep. 268,) and of *O'Connell* vs. *Strong*, (*Ib.* 265,) are full to this point. In ordinary cases, this would not be questioned. But it is supposed that this case is not governed by the ordinary rules applicable to cases of liability, arising out of the relation of master and servant. I am at a loss to conceive any just reason for this motion. The law, it seems to me, is to be regarded as a general science, applicable to every case coming within the letter or the reason of the rule. Where it is within neither, it becomes an exception to it. It is only necessary to state this case, to see that it is within both the letter and reason of the rule; for the defendants employ the plaintiff to act under the command of another of their servants. In such a case, the servant in command, is in the place of the employers. When they hire another to engage in a service, where neither his own care nor prudence can shield him from injury, which may arise from the act of another of their agents, having the control of him, the question of their liability depends upon the care used by such superior agent. The ordinary rule in cases of hiring goods, is, that the hirer should use that degree of care which a prudent man would take of his own goods. If this degree of care is shown, then the hirer is not liable for any injury which may result to the goods hired. This rule, it seems to me, must, necessarily, be that which applies to this case. Is more favor to be bestowed on a man's goods than on his person? It would be strange that this should be so. It may be tested, however, by inquiring if the plaintiff, instead of himself, had hired his negro man to the defendants as second fireman, and he had lost his leg by the care-

lessness of the engineer, would not the defendants have been liable? It seems to me that they would, or one section of the law of bailments would be repealed by the Court of Errors. There can be no difference in the law, as applicable to the white man or the slave, in a contract of hiring. *405] Both are capable of self-preservation, and both are *capable of wrong and right action; and in the capacity of firemen, both are under the orders of the engineer, and must look to him for safety.

In the cases of *Drayton* ads. *Moore*, and *Parker & Co.* vs. *Gordon*, (Dud. Rep. 272,) it was said, "when a master employs slaves in any public employment or trust, such as tradesmen, ferrymen, wagoners, patroons of boats, or masters of vessels in the coasting or river navigation, he undertakes, not only for their skill, and faithfulness to all who may employ them, but also, for their general skill and faithfulness to the whole community." This rule stated as to slaves, applies more forcibly to hired servants, and my brother Johnson, who then resisted the rule as to slaves, admitted it in its fullest extent as to hired servants. Taking this as settled law, how stood the plaintiff in his contract with the defendants in relation to the engineer? Had he not the right, according to law, to regard the defendants as contracting both for skilfulness and faithfulness? It seems to me, there can be no doubt about it. Well, this being so, if the engineer was negligent, the defendants' undertaking for his faithfulness was broken, and they are most clearly liable.

It is, however, urged (and that is, as I understand, the ground on which the Court of Errors decides the case) that this case is one of novel impression, and not to be decided by the ordinary rules of the law of bailment. Conveyance by locomotives on railways is supposed to be more analogous to shipping than any thing else; and hence, unless a sailor could recover for an injury arising from the neglect of a master, it is supposed that a fireman cannot, for an injury arising from the neglect of the engineer. Before I discuss the case in this new aspect, I deny that any mode of conveyance on land is to be put on a footing with the navigation of the ocean in ships. That is governed by the principles of law coeval with society, and in many respects common to every civilized nation of the earth. Conveyances on land are also regulated by a very ancient and well-settled law wholly distinct from the other. It will, however, be sufficient to show by one plain view, that the law applicable to mariners cannot affect this case. Unless a vessel earns freight, the mariner is entitled to no wages. Suppose a locomotive running from Charleston to Aiken should burn up the entire train, and thus earn no *406] freight, *would not all the hands hired by the defendants to manage her, be entitled to their wages? There could be no more doubt that they would, than that a man hired to drive my wagon to Charleston, who, by some unforeseen accident should lose his load, would still be entitled to his wages. This shows that in the very beginning there is such a difference in the law of a ship and that of a locomotive, that it is impossible the law of the former can decide the right of a servant employed in the latter, to recover for an injury arising from the neglect of the engineer.

But if it were otherwise, and this case depended upon maritime law, still I am inclined to think the plaintiff ought to recover. No exactly analogous case can be found. In Phillips on Ins. 463, Judge Story is

represented as saying, in the case of the Saratoga, "It appears to me, that upon the established doctrine of our law, where the freight is lost by *inevitable accident*, the seamen cannot recover wages, as such, from the ship owner." I concede that this dictum is the true law regulating a mariner's right to wages. If the freight was lost by the master's neglect, it could not then be ascribed to *inevitable accident;* and then, I think, the seaman would be entitled to recover If this is true in relation to wages, the same rule must hold as to the mariner's right to recover for any injury arising from the negligence of the master.

But, it is said, it would be impolitic to make the defendants liable for any injury accruing to a fireman, from the neglect of the engineer. This would be worth inquiring into with great care in the Legislature; but, in a Court, I think we have nothing to do with the policy of a case; the law of it is our guide. But if we are to look to the policy, then I should argue that the more liability imposed on the railroad company, the more care and prudence would be thereby elicited. This result is what the community desires. For it secures life and property, committed to their care.

I think the motion ought to be dismissed.

GANTT, J., concurred.

J. JOHNSTON, Ch., also dissenting. It may not diminish the force of the observations made by Mr. Justice O'Neall, if I *state very briefly the reasons which induce me to concur in his dissent. [*407

It is admitted that the duties and liabilities between masters and hired servants, result only from the nature and terms of the contract which forms the relation; and that neither party is allowed to extend or abridge the contract. That the master cannot exact other services than those stipulated for; nor, by any indirection, subject the servant to any other than the ordinary perils incident to the employment; and that if he does, by any agency whatever, or by any means, whether of design or negligence, accumulate upon the servant, while in the performance of his duty, any dangers beyond these inherent in the service itself, they fall upon the latter, not as a servant, (for his contract does not bind him to endure them,) but as a man, and the law entitles him to redress.

It is also admitted that these principles are not confined to cases where one servant only is employed, but prevail when a plurality are at the same time engaged by the same master. Their application, however, in cases of the latter description, depends upon the terms of the contract. If several jointly contract to perform a specified duty, the master is not liable to either of them for injuries resulting from the faithlessness or negligence of his coadjutor; all of them being, substantially, agents for each other, to perform their joint undertaking. But when their engagements are several, each undertaking for himself, to perform distinct offices, in a matter susceptible of a division of labor, each stands to the master in the same relation, and is entitled to the same rights, as if he was the only servant employed. The master is responsible to him, as he would be to a stranger, for the misconduct of the others, who are exclusively his, the master's, agents.

Now, this is admitted to be the general law upon the subject; and it is applicable to the servants of a railroad company, as well as to those

of any other employer, unless there be something to take them out of its operation.

No instance of master and servant has been pointed out where these principles do not obtain, except the case of a ship's crew; but that stands clearly upon special grounds of usage.

If the servants employed about a railroad, are excepted out of the general rules relating to agency, the exception, with the *grounds and reasons of it, must be shown, otherwise the employers will be as liable to any one engaged in their service, for injuries inflicted on him by other agents, in the course of their employment, as a planter would be to a hired hand for maltreatment by his overseer. *408]

I presume no one will contend that the rule applicable to service in a railroad company, is, that the company is not liable to *any* agent, for *any* injury, provided the company can only show that another of its agents has inflicted it. Would it do to say, for example—and upon what principle could it be said—that a superintendent of the hands engaged in repairing the road, may, with impunity to the company, abuse his authority, to the injury of their health? Or, if the cars were to be run at night, and, through the neglect of hands set apart to watch the road, and remove obstructions, the whole train were lost, and any officer or hand on board were crippled, certainly no one means to assert that none of these could claim compensation from the company, but must look exclusively to the irresponsible agents (perhaps slaves,) hired by the company, through whom the injury accrued? And yet, how is the rule to be laid down—I wish to hear the rule stated—which would include that case and exclude this. The fidelity of the hands detailed to superintend the road, in the case I have supposed, would be as essential to the common enterprise of running the cars, as the fidelity of the hands on board to their respective duties. If the idea is indulged, that there is, in any branch of this enterprise, an implied undertaking among the servants to do the work jointly, and to waive the neglect of each other, what will constitute such an understanding? Where are its limits? Does it arise from the intimate connection of the hands? Then, I wish to be informed what degree of intimacy, what strength of association, is demanded, to raise the implication? Where is the line?

I give no opinion upon the evidence. I take the verdict for the facts; and, according to the finding of the jury, the plaintiff faithfully performed his particular duty, and, while performing it, was injured by the faithlessness or negligence with which the company, acting in the person of another agent, executed a duty incumbent upon them. Ought the plaintiff's remedy to be doubtful?

*The elements of the contract between him and the defendants, are these: on their part, so far as they were to contribute to the propelling of the cars, that they would carry him safely; and, on his part, that on the trip he would perform certain offices. With respect to the last, he was their servant; with regard to the first, he was their passenger; and as their passenger, they have crippled him. The distinction is plain, and the propriety of applying it would be as plain, if instead of being stationed where he was, he had only been a clerk, hired by the company to travel up and down in the cars, and take a minute of their operations. Yet, on principle, no discrimination can be drawn against *409]

him on account of his being a fireman, and not travelling clerk; because he had as little connection with, or control over, the department from which his injury sprang, or the agent to whom it was exclusively committed by the defendants, as if he had been assigned any imaginable duty in the remotest part of the train.

NOTE.—This case was argued before the present incumbent was elected to the office of *State Reporter*, which will account for the want of the usual notes of the argument of counsel. He has been furnished by his Honor, Judge Richardson, with the argument of Col. Blanding, submitted by him, in his life time, to the Appeal Court, which he has published with the case. The Reporter regrets, exceedingly, that he has not been furnished with the eloquent arguments (as he has been informed they were,) of the different counsel who were engaged in this case.

See 9 Rich., 93, 468; 4 Rich., 426; 5 Rich., 15; 1 Strob., 525, and other cases concerning passenger carriers. *An.*

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*SAMUEL BURGER, Tax Collector, *ads.* THE STATE, EX RELATIONE WILLIAM CARTER. [*410

The first clause of the Act to raise supplies for the year 1839, which directs "that a tax shall be raised and paid into the Treasury of this State, of one-eighth of one per cent. upon all purchases and sales of bullion, specie, bank-notes, bills of exchange, and stocks, which may be made by any brokers or agents in this State, for or on account of any bank, company or individual without the State; and also, upon all such purchases and sales as may be made by any such broker or agent upon his own account, or for account of others engaged in the same pursuits," held to be constitutional, but prospective in its words.

By the tax Act of 1788, the fiscal year is considered as beginning on the first day of October, preceding the enactment of the tax Act.

A writ of prohibition will lie, to restrain the enforcement of a tax execution.

Before O'NEALL, J., at Chambers, Charleston, February, 1840.

This was an application for a writ of prohibition, to restrain the defendant, the tax collector of Saint Philip's and Saint Michael's from collecting a tax imposed upon the relator, under the provision of the first clause of the Act to raise supplies for the year 1839,(*a*) which directs "that a tax shall be raised and paid into the Treasury of this State, of one-eighth of one per cent. upon all purchases and sales of bullion, specie, bank-notes, bills of exchange, and stocks, which may be made by any brokers or agents, in this State, for or on account of any bank, company or individual without the State; and also, upon all such purchases and sales as may be made by any such broker or agent, upon his own account, or for account of others engaged in the same pursuits."

The same clause, in a previous part, imposes a tax of "sixty cents per hundred dollars, on factorage employments, faculties and professions."

The relator alleges, that he is not a broker or agent within the meaning of the law; but in making the purchases contemplated in it, he acts as a principal, and on his own account.

It might be enough to dispose of the case, on this allegation in part,

(*a*) 11 Stat., 1.

and direct the plaintiff to declare in prohibition, so that the truth of it might be ascertaind by jury. The definition of the word Brokers, given in the Commercial Dictionary, is "persons appointed to transact business between *merchant and merchant, or merchant and tradesmen, in *411] matters of money or merchandise, for which they received a stipulated commission," it may be that this definition would not embrace the relator. Still I have no doubt in construing the statute, that we may look to a popular meaning of a word not embraced in any strict definition. If the relator is a broker or agent, acting for a bank, company, or individual without the States, in making such purchases, although he may use his own funds, and although he might consider them on his own account, still, he may be within the sense and meaning in which the legislature used the words. I will not, however, pursue this matter, for I shall not avoid giving my judgment on the graver questions made.

I have no doubt, the tax was intended to be imposed on such brokers or agents as usually make purchases of bullion, specie, bank notes, bills of exchange, and stocks, for any bank, company, or individual without the State, whether the purchases were made for or on account of the bank company or individual without the State, or for or on account of such brokers or agents themselves. Unquestionably, the object of it was, to subject to tax transactions of this kind, which could not be embraced in the tax on factorage employments, faculties and professions; and so far, if the law could be enforced against them alone, I should think the tax legitimate and proper. For it is not to be allowed to corporations or individuals of other States, to have, free from taxation, all the benefits of a business, in which, if our own citizens engage, they pay a tax on their income. But, so far as it would operate on the income of the brokers, derived from this business, then the effect of the Act would be, to subject it to two taxes at the same time, the tax of sixty cents on factorages, &c., and the tax of one-eighth of one per cent. on all purchases and sales of bullion, &c. This could not have been intended; for the Legislature of South Carolina never have done, and never will do an act of wilful injustice. If this, however, is the clear effect of the law, it might constitute a reason for holding it to be unconstitutional, on the ground, that the same thing cannot be twice taxed, without violating the guaranty of property, which our constitution secures to each and every one.

*412] This position is, however, not necessary to be assumed as *a distinct ground of decision; it may be resorted to in aid of the conclusion to which I shall come in another part of this case.

The first inquiry is, can the defendant be subjected to an assessment of one-eighth of one per cent. on all purchases and sales of bullion, &c., made before the 1st of last October? According to the tax Act of 1788, the fiscal year is considered as beginning on the 1st day of October of the year preceding the enactment of the tax Act. Income and property, (with the exception of stock in trade,) are returned as of that time; and the usual taxation of the State is raised and paid accordingly. If, however, the Legislature choose to raise a new tax, and use words which show they could not have intended it to be raised as of a past time, then it would be violating every rule of construction to give it that effect. The words here used, plainly point to a future act to be done, on which the tax, (as the Legislature call it,) is to arise.—"One-eighth of one per

cent. on all purchases and sales of bullion, specie, bank notes, bills of exchange, and stocks, which may be made by any brokers or agents," &c. If the relator had, on the passage of the Act, closed his office, and ceased to do business, it is clear that he would not be liable to the payment of any thing under this provision. That being the case, his subsequent pursuit of the same business cannot make him liable on his past transactions. Then, it is only necessary to refer to the case of the *State* vs. *Allen*, (2 McC., 55,) as a conclusive authority on this point. The Act of 1820 imposes a tax of $10,000 upon any person "who shall, after the passing of this Act, open or keep open, any office for the sale of any lottery tickets," &c. It was held by the whole court, that the language of the Act being prospective, the tax, as it was called, could not be referred to the commencement of the fiscal year. The words in the Act of 1839 are as plainly prospective as those used in the Act of 1820, and no room is left for a distinction; and hence, both from their own legitimate construction, and from the authority of the *State* vs. *Allen*, I conclude that the assessment on the relator, as of the 1st of last October, is not authorized by the Act.

The next, and most serious inquiry, is, Is the provision which we are considering, a tax or a penalty? If it is the latter, then *it is [*413 unconstitutional, and cannot be enforced. I have endeavored, in every way which I could, to avoid the conclusion to which I have come. The duty of passing between the Legislature and the people, is not to be courted by even a full bench of Judges, much less should it be willingly assumed by a single Judge. But there is nothing more sacredly due to the people, by a Judge, than the duty of protecting each and every one of them, against plainly unconstitutional enactments.

Generally, I would say, that taxation is of three kinds—property, income, and capitation. A liability to pay into the treasury a sum of money, which is to arise on an act to be done, is hardly to be considered, in any point of view, a tax. It is, then, in restraint of action, and is a penalty. The only apparent exception which strikes my mind, is that of duties and imposts. They are, however, levied on the property; and although the liability to pay them arises from an act done in bringing the goods into a port of the United States, still they are essentially a tax on property. This, if it could be considered as in reality a tax on income, although it might arise from an act to be done, I should be disposed to hold, that it was a rightful exercise of the taxing power. But it is plain that it is not a tax on income, for the income of the relator had already been taxed. It is, then, in restraint of his action in purchasing or selling bullion, specie, bank notes, bills of exchange, and stocks, both for any bank, company, or individual out of the State, or on his own account. This makes it a plain case of penalty. It is saying, if you do such an act, you must pay to the public such a sum of money. Here the constitution guarantees a trial, both by the defendant's peers, and also according to the course of the common law, which I understand to be the meaning of "the law of the land." For, before the defendant is liable to pay it, an act done must be ascertained. He cannot be made to accuse himself, or forced to testify against himself, according to the course of the common law; and yet, according to the tax Act, he must make his return, on oath. This would be in violation of his right of trial as a

freeman, and cannot, therefore, be enforced. The ascertainment of the fact on which his liability to pay, arises, can only be *per testes* on a trial by a jury. The power of the tax collector to assess a tax on an act to be done, and issue his execution, is in violation of the protection guaranteed by the constitution.* It cannot derive any support from the sum *414] required to be paid for a license to keep a tavern, or retail. The party there pays, voluntarily, a sum of money, to do an act which would otherwise be unlawful. That is consentive, and not compulsory, and cannot be, therefore, objected to. If the Legislature had thought proper to require that brokers should, before engaging in the business described by this Act, take out a license, and for it should pay a sum of money, they might have done so. That this provision is a penalty, is, I think, fully made out by the reasoning which I have very imperfectly sketched.

The case of the *State* vs. *Allen*, (2 McC. 55,) is an analogous case, and its authority makes it imperative on me to declare this provision of the Act of '39, unconstitutional, as the Court then did that of 1820.

It is ordered that the writ of prohibition prayed for be granted.

From this order the respondent appeals, and moves that the same may be reversed, or rescinded, for the following reasons:

1. That the Act of 1839 must be construed in connection with the Acts regulating the fiscal year; and that by the proper construction of the Act of 1839, the tax on brokers is not prospective, but applies to the relator, and renders him liable to the payment of the sum assessed against him by the respondent.

2. That the subjects of taxation by the Legislature, are not limited by the constitution; and that a pecuniary imposition is a tax, or a penalty, as the Legislature may make or declare it to be the one or the other, by legislation.

3. That there is no ground for a discrimination between a tax and a penalty, with reference to the subject matter of the imposition; and there is, therefore, no ground to declare the tax on brokers a penalty, which will not apply equally to every tax which has been, or can be, imposed by the Legislature.

4. That to declare a tax unconstitutional, on the ground that it is a penalty, is an invasion of the powers exclusively vested in the Legislature, by the constitution; and involves a principle which concentrates in the Judiciary all *415] the powers *of government, which it was the object of the constitution to lodge in separate departments.

5. That the order directing the writ of prohibition to issue in this case, is, in other respects, illegal, and an infringement of the provisions of the constitution.

Bailey, Attorney General, for the motion, contended, first, that the Act was not prospective. That there was nothing to distinguish this Act from any other Act passed in 1839. The various *Tax Acts* have no specific time when the returns or assessments shall be made. Act 1788, (Public Laws, 439.)

2d. That it is not unconstitutional, because there is no restraint upon the taxing power. He cited Jac. L. D., as to the definition of taxes. *Berney* vs. *Tax Collector*, 2 Bail., 654; 4 McC., 206; Com. Dig., letter A., Tit. Prohib. Prohibition will not lie against a ministerial officer. Bac. Abr. Tit. Pro., letter J.; 1 Cranch, 137.

Hunt, contra. I contend that the general power which it is admitted the Legislature possess, in selecting the subjects of taxation, must be controlled by the great fundamental principles upon which free government is based.

Taxation includes the power to collect, in a summary mode, the amount levied, from the necessity of the case. This arbitrary, but indispensable power, must be used only to the extent indispensable for the public weal; not abused, by applying it to the purposes of penal enactments, and under the guise of taxation, to impose penalties which are to be collected by an inquisition and execution by a collector,

without recourse to the ordinary tribunals of the country. The constitution protects the citizen from all judgments against his person or property, otherwise than by a judicial trial by jury, as heretofore used. Now, the true difficulty is to ascertain whether, in truth, the imposition is a tax or not. But the nature of taxation must be ascertained by the general understanding of free government, and especially that from which we derive most of our principles of jurisprudence, modified by our free institutions.

A tax, as generally understood, is a contribution by the people, in proportion to their estates, for the public expense. And as in this State taxation and representation should concur, all who vote, should, as near as may be, pay equally; and certainly it is unprincipled to tax what a man does, and not his property. Even a tax on the income of a peculiar profession, has at least this palliation, that it is proportioned to the property acquired by that calling. But a tax, as in this case, upon the operation itself, without regard to the fact, whether much or little or nothing is acquired by it, is a tax upon what a man does, and not upon his property. Neither is it like a capitation tax, where every individual pays an equal amount. *Neither is it like a stamp act. The law denies its aid to recover [*416
on contracts not engrossed on stamped paper, leaving it to the option of the party to buy this privilege.

Nor is it a license, which is voluntarily sought for; and the tax collector cannot collect a penalty for retailing without a license. It is a case for the Courts. Any attempt to impose is illegal, and the very amount of the alleged tax is one means of ascertaining the nature of the imposition.

Taxes, to be legitimate, must be *moderate;* and excessive imposts, with a view to protection of one class, by exactions from others, are contrary to common right. The Legislature may prohibit, and impose penalties for the purposes of general morality; but taxation is not the mode of enacting or enforcing penal laws.

Now, the law in question lays a tax "upon all purchases and sales of bullion, &c.," without regard to the income or profit arising from the purchase or sales. It is a penalty on such transactions, under the guise of a tax—it is an imposition upon a particular class of industrious dealers, not for revenue merely, but the amount is so enormous that it is calculated not to raise money, but to break up the business. The usual profits upon stock transactions and money transfers, is little, if anything, more than this tax. Fifty or eighty per cent. on the profits of a transaction is too clearly a penalty, or at least a tax, calculated and intended to be prohibitory. Is prohibitory taxation constitutional?

Equality of rights lays at the foundation of our institutions, and the perversion of the taxing power, to foster or prohibit any honest labor, is against common right, and unconstitutional.

Although no limitation is fixed expressly, yet the Article 1, section 15, Constitution of South Carolina, speaks of "Bills for raising Revenue," as tax bills. But it is said, the amount is not fixed; but sec. 4, art. 9, states, that "excessive fines shall not be imposed." This clearly shows that the people shall not be interfered with by excessive fines; and a *fortiori*, taxes which are excessive are against the nature of our institutions.

The case of *Burnie* vs. *Tax Collector*, shows, that under the pretence of taxation, you cannot enact penal laws. This Act is, therefore, unconstitutional.

The proceedings of the tax collector are also illegal. The tax, like all others, relates to the 1st day of October. And as the transactions of the previous year were legal, and without any imposition at the time they transpired, to collect so large a sum as one-eighth of one per cent., when one-fourth is the highest amount of commissions, equal therefore to fifty per cent., is equally unjust and illegal. It is a penalty imposed after the act done. Calling it a tax does not alter its nature. If, on the contrary, the tax is prospective, then it is not due until the year expires, and the attempt to collect it, at the time the collector made it, was premature, and the prohibition *must go. The very fact that it is a tax on actions [*417
and not on property, renders it difficult to say when and during what periods these actions are to transpire. Taxes are annual—that is, property is taxed once a year. But this Act does not limit the time to the past year or the present, and there is no time within which the return must be made; and the tax collector might, every day, issue his execution as a sale was made. Is not this evidence

that it is a penalty? The power of this court to interpose, results from the fact, that there are two kinds of law which this court is called on to administer—the Constitution, and the Acts of the Legislature. An Act of the Legislature contrary to the Constitution is not obligatory; and, therefore, whoever attempts to enforce it against the citizen, impairs his rights, and the court must protect him. The Legislature having passed a law is *functus officio*. They cannot, after adjournment, stay the execution of a law. It is only the judiciary who can act—without it, an unconstitutional law may be enforced. All tribunals must be subordinate to the highest. The tax collector acts judicially when he fixes the amount; assesses, that is, adjudges, that the citizen is bound to pay the State a sum of money. If his judgment is wrong, the citizen has the right to the interference of this court. Whether prohibition be the mode, is immaterial; and in this State, the strict meaning of that writ in England, has been enlarged for the beneficial purposes of protecting the constitutional rights of the people. Thus, the Commissioners of the Tobacco Inspection, the Court of Wardens, and several other tribunals or boards, have been treated as courts, and prohibitions issued when they denied justice or exacted what was unlawful. Every board or commissioner exercising any jurisdiction over the persons or property of the citizen, is a judicial tribunal; and the writ of prohibition is the proper writ to restrain their proceeding.

This Act is absurd, as it speaks of a broker or agent selling on his own account, when his being an agent implies that he acts for another. But it is clear, that the object of the Act was, to prevent competition between brokers and the banks, who have abandoned their legitimate office of discounting paper coming to maturity where their capitals were located, and thus enable the banks to manage exchanges so as to suit their own purposes. It is a perversion of taxation to create monopolies and interfere with the common rights of the whole community, to pursue their avocations under the protection of equal laws

Bailey, in reply. All Acts from 1790, down to the passage of this Act, are retrospective, if this Act of 1839 is decided to be so. A tax is in the nature of a contribution. A tax collector is not a judicial, but a ministerial, officer.

*418] *Curia, per* O'NEALL, J. In this case, I have been unable to discover any error in the opinion and judgment below. But a majority of the Court of Errors are not prepared to go as far as I did, and rule the clause of the Act of '39, under consideration, to be unconstitutional. They, however, agree with me, that it is, in its words, prospective, and did not justify the imposition of the tax assessed by the tax collector. The reasons assigned, in my opinion below, for this conclusion, are satisfactory to them, and need not be re-stated.

It has, however, been objected by the Attorney-General, in his argument here, that the writ of prohibition did not lie to prohibit the enforcement of a tax execution. I concede that if we were obliged to resort for authority, in this respect, to English precedents, we could not sustain this proceeding. For, according to them, the writ of prohibition only lies to prohibit the enforcement of the judgment of an inferior jurisdiction, where it has proceeded without jurisdiction, or where, having jurisdiction, it has exceeded it.

But in this State it has had a wider operation. For the want of a better remedy, it has been allowed to restrain the enforcement of tax executions. How this practice began, it is difficult, as well as unimportant, to ascertain. It may be that it was allowed on the notion that a tax collector, although a ministerial officer, exercised a sort of judicial power, in deciding that a person who denied his liability to pay a tax, should, notwithstanding, pay it, and in issuing an execution to enforce that decision. This last is so much an incident of the judgment of a Court

of general and limited jurisdiction, that when found to follow from the decision of a ministerial officer, it may well justify the application of a writ to him, which would be otherwise wholly inappropriate.

Be this, however, as it may, the practice is well established, has never been before questioned, has operated to the protection of the citizens; and, so far as our experience or information extends, has effected no injury, and produced no inconvenience. We are, therefore of opinion, that it ought not now to be disturbed, for the sake of obtaining precise and technical conformity to the English precedents. The motion is dismissed.

*Gantt, Evans, Earle, and Butler, JJ., and D. Johnson, Ch., concurred. [*419

Harper, Ch. I concur that the tax was prospective only, and reserve my opinion as to the authority of the Court to grant prohibition in such case.

Dunkin, Ch. I concur in the result, but give no opinion on the question of prohibition.

Richardson, J., dissenting. Two questions are before the Court:

1. Is the sixth enacting clause of the tax Act of 1839, within the authority of the State Legislature to lay taxes?

2. Is the tax prospective or retrospective, in its operation?

This Court does not undertake to decide whether the proposed tax be wise, or just, or onerous, but whether it is within the constitutional delegation of the legislative power.

Were we to trace the consequences of such a tax, we might perhaps, find it calculated to retard the influx of capital, if not causing its efflux from the State, and, therefore unwise. It may be a high tax, and unlooked for, and, therefore, both unjust and oppressive.

But such considerations, although apt to affect the mind and bias the judgment, are for the Legislature alone.

The office of the Court is to go to the source of the Act, in order to discover whether the enactment of such a tax comes within the proper legislative authority, or does it constitute a penalty, to attach only after a verdict of guilty of selling "bullion, specie, &c." against the form of the Act, &c. It is either a tax or a penalty; and to decide which, we are to turn to the constitution of the State.

"The legislative authority of this State shall be vested in a general Assembly." (Art. 1.) And we need not labor to prove that laying taxes is within the legislative authority.

But, on the other hand, among the restrictions upon so comprehensive an investment of legislative power, is the following: "No freeman of this State shall be taken, or imprisoned," &c., "or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." (Art. 9, sec. 2.) This is the article that suggests so often the ex-
*pressive figure, the Ægis of the constitution. Here, too, it is admitted that, under this wise, protective provision, if the alleged [*420 tax shall amount to a penalty, for some infraction of the laws, the tax collector cannot, by his authority, assess the penalty under the name of a

tax; for if a penalty, a jury must decide upon the supposed infraction before the penalty can be inflicted.

Does, or does not, then, the alleged tax amount to a penalty? What is a tax?

It is a contribution, in money, required by law of every citizen, for his property, income, or person, or for the use of any personal or other rights, which are protected by the government of his country.—I have somewhere read that in Great Britain every thing except water is taxed, in some shape; and the observation is characteristic of the power of taxing whatever is used or enjoyed.

For instance—in that country, the use of light and air is paid for, in the window tax—that of fire, was formerly in the hearth tax—contracts and the use of paper, in the stamp act. Talents, industry, and learning, in the tax on professions. The right of calling debtors to account, in the tax on law proceedings. The boasted "*Nulli vendemus justiciam*" of Magna Charta, has not shielded judicial justice from taxation, and the established religion brings with it, "great tithes to the rector, and small tithes to the vicar." All property is taxed, down to dogs. Life is assessed in the poll tax, and the right to be buried is taxed, in the shroud required by law.

I have made this selection of taxes from high authority, in order to show how universal is the application of the taxing power, to any subject, or right, thing or action. (And if I may be indulged in the incidental reflection—may the two hundred millions of dollars now due by the individual States, and the passion for borrowing abroad, not bring them into this favorite high road of our English ancestors; or at least, not without their secret of spending, at home, the whole proceeds of the one, and keeping there the entire interest of the other, which so lightens the burden of heavy taxes.

But to proceed—when we consider that the foundation, principle and inseparable duty of government, is to protect persons, rights and property, it is but strict reciprocity, that the commensurate right of taxing
*421] follows on the part of the *government, for its own safety, permenance and policy.' And, that there can be no limitation, but by some fundamental and paramount law, or the change of rulers. It is important in the consideration of the case before the Court, to call to mind the time, manner and true end of taxes.

Taxes are generally laid annually, because they are laid for the purpose of raising the supplies for and during the established fiscal year. They are usually upon things or rights, which have been already used or enjoyed; because they have been already protected, and because the value of such things or rights can then be most safely estimated and justly rated. As to the manner—it may be tyrannical to surprise the citizen by unlooked for taxes. But the timely notice of what shall be taxed, can be seldom given, because every successive Legislature must estimate the supplies for the coming year—while they judge by the actual history of the past year, what property or revenue, right or enjoyment, can most easily and justly bear this burden of taxes.

As to the character and end of taxes. Why is it, that we cannot divest taxation of the idea of a loan, advancement, or subsidy. It is because they all depend upon the actual means. Rents, profits and

wages are the sources of the supplies, under any name. And rightly considered, all such supplies are to come back to the people, in some right, profit or enjoyment. Yet still, they are no more than a choice of burdens, and admit of great abuse.

But, all that can be done, is to consult the actual means of the country, in order to indicate the justice of all taxes. And we see, at a glance, the sagacity of the Legislature which, by wise laws, draws into its own State pecuniary means, making, in this way, the wealth of foreign nations tributary to the welfare of their own. And how unwise to occasion the efflux of capital or interest—transferring to others the industry of their country. And here, at least, for the argument sake, let the brokers' tax be considered of this character.

The principles noticed are self-evident, and exhibit their own reason. And the following rule is evidently deduced from them. It is considered (see 1 Comm. c. 8,) as a rule of construction of revenue acts, in ambiguous cases, to lean in favor of revenue. This rule, says the great commentator, will be found to be agreeable to good policy and the public interest.* But it is still more clear, as our own rule, that the Court is to hold all Act of the Legislature constitutional, unless [*422 clearly repugnant to the paramount law of the constitution.

Now, then, let us apply these well established rules, and such principles, in the construction of the tax Act of 1839. After several other taxes, the Act proceeds in these words, "thirty cents, ad valorem, on every hundred dollars, on the value of all lots, lands, and buildings, within any city, including all lots or portions of land on which buildings *may be erected*, in the immediate vicinity of any city, &c. Sixty cents per hundred dollars on factorage employments, &c.; and on the amount of commissions received by vendue-masters, and commission merchants, &c., one-eighth of one per cent. upon all purchases and sales of bullion, specie, bank notes, bills of exchange and stocks, which may be made by any brokers or agents in this State, for or on account of any bank, company, or individual, without the State; and also upon all such purchases and sales as may be made by any such broker or agent, upon his own account, or for account of others engaged in the same pursuits; to be ascertained and rated by the assessors and collectors throughout the State, according to the best of their knowledge and information," &c.

It is supposed that the tax of one-eighth of one per cent. upon "bullion, specie," &c., may be unconstitutional. But such sales are the ways and means of profit and wages to the broker; and, being protected, are subjects for taxation, like the sales of auctioneers or factors. And the tax is as well rated or measured by the amount of sales, as by the commissions of the broker. They are the same measure essentially.

It is argued that it amounts to a double tax. But that would only make it a high tax—not render it unconstitutional. All absentees pay a double tax; upon the wise rule, that we should discourage the efflux of money. And assuredly, a double or high tax may be laid for other causes. Any man may act as factor, broker and auctioneer, and render return for each employment respectively. Rich men make returns for various property. And he that carries on many professions must do the same; and ought not to complain, if all his ways and means are made to

contribute. In answer to this part of the argument, it ought to be enough to say, that the *sales of "bullion, specie," &c., being taxable, the salesman must pay the tax laid according to law. *423]

But the great and true objection is, that this tax amounts to a penalty. If it be so, the relator is shielded by the ninth article of the constitution, already recited. But why is this tax more a penalty than the common tax upon auctioneers, factors or commission merchants? This is not a pecuniary fine for doing an unlawful act, but a contribution for being protected in making profit and wages—and of selling "bullion, specie," &c. It is, surely, one of the lawful ways and means of profit. For my own part, I do wish that we had here, in our commercial capital, the sales of all bullion, specie, bank notes, bills of exchange, and stocks, sold in the United States. Such a mart would do more for our foreign exchanges, perhaps more for our commercial advancement, than the great Western Railroad completed to the Ohio, and the direct trade with Europe, both of which are so justly desired; and my only objection to the tax is, that it may check the influx of such rich ways and means. What would the Lord Mayor and Common Council of London think, if the sales of American and other foreign stocks were checked by a high excise duty.

I trust that, in these incidental observations, it will be seen that the fairest play is given to the argument against the tax. I defend its constitutionality only.

Under the head of penalty, the case of the *State* vs. *Allen*, (2 McC. 55) is relied upon; and the argument is, that courts should be uniform in their decisions upon similar cases. This is most true. Therefore, let us consider that adjudication. In the mean time, I cannot but anticipate that the argument, from uniformity will presently change sides.

The tax Act of 1820 imposed, in terms, a tax of $10,000 upon any person "who shall, after the passing of this Act, open, or keep open, any office for the sale of any lottery tickets." The so-called tax was not measured, or rated, by the sales, profits, or success of the lottery office. It was the plain infliction of a specific fine, for opening, in future, such a source of excitement to gambling propensities as a lottery office. Whether the office sold a single ticket or many thousand, the fine was the same. Of course, there was nothing *for the tax-collector to assess. The supposed tax bore, then, every mark of penalty or punishment for an act done, or at least, for a privilege assumed; and it followed, that the party accused, must be first convicted by a jury, upon which the fine followed, subject to the pardoning power of the Governor. *424]

The ninth section of our present tax Act illustrates the principles of Allen's case. Any person may now purchase the privilege of vending lottery tickets for $2000, but on default, he is subject to the same fine of $10,000; so that it was, and is, a penal enactment. But the tax before the court, has no characteristic of the kind. But suppose that doubtful, are we not, then, to apply the rules before laid down? The construction is to be favorable for raising the supplies of the State; and no Act is to be held unconstitutional, unless it be clearly at war with the constitution of the State.

Of this last rule, I beg to be indulged in a brief exposition, for its importance sake, on both sides of the present case; and especially because lately I do think that motions for prohibitions are getting somewhat

rife. And it may be better to resist their undue encroachments, than to have to cure their evils.

The constitution, and all statutes passed, are simply laws intended to be made, "*in pari materia*"—upon the same subject. Every Act applies and illustrates some authority of the constitution, by practical example and enforcement. It follows, that the secondary law of the Act, to be good and valid, must be inseparable from the primary principles of the constitution, which is, at once, its source and its warrant. Hence, it is, that we are to apply the principles of the one, in order to test the validity of the other. And hence, too, the unavoidable judicial duty, not privilege, so to apply the constitutional test, as to declare the supposed law of the Act, valid or void, as it may be found united with, or repugnant to, the law of the constitution. It equally follows, that where there is any union between the law and the constitution, the Act is within the Legislative authority. And being truly *in pari materia*, it must stand.

If I may use a figure of speech—wherever the parent law of the constitution tolerates the Act as its offspring, it is legitimate, *however deformed in our eyes. And, of course, he that would [*425 repudiate an Act, takes the burden of proving its repugnancy upon his own shoulders.

To this exposition, let me add, that a revenue Act is among the last of all laws in which Courts should be placed in conflict with the Legislative department. Because the subject and extent of taxes are necessarily at the Legislative discretion, and Courts cannot interfere with the discretion, so vested in another department of government.

Having now established, that the broker's tax is no penalty, but plainly a tax, within the legislative authority to tax; and I would apologize for exhausting time upon so plain a proposition, did I not feel, that a thorough conviction on that head of the argument, is the proper and unerring clue to the true exposition of the second and final proposition: I do not speak beyond my conviction, in saying—grant the first, you give the second; and that the prohibition ordered, can be supported, only by upholding the entire decision of the Circuit Judge. And I now, therefore, lay down the proposition, so established, as decisive of the second question of the case.

Doubtful words are expounded by their subject matter. If, then, the new tax upon brokers be itself constitutional, it is, then, to be assessed and paid, unless otherwise plainly expressed, like other and former taxes —*i. e.* under the Act of 1788, for expounding all our annual tax Acts. And all that I have said, upon the union between Acts and the constitution, would apply equally to the Acts of 1839 and 1788—we cannot uncouple them. And I might, here, well ask more than I demand—that unless the Act of 1839 be expressly future and prospective, as to the tax, it is *ipso facto* retroactive, and enacts a tax for the past fiscal year. And, I here admit, that if the tax on brokers were plainly prospective, it would then have one mark of a penal enactment, and militate against my first proposition.

But let us turn untrammelled to the terms of the Act—"one eighth of one per cent. upon all purchases, sales," &c., which may be made, by any brokers or agents.

Do these words mean "sales which may have been made," so as to relate back to the past fiscal year, or do they mean such sales as shall be
*426] made, after passing the Act of 1839? and *thus give no authority for the assessment made, of the 1st of October, preceding.

First—The former is, in my judgment, the true grammatical construction; "sales which may be made," mean—which may *have* been made, rather than sales which *shall* be made. I would say this, independent of the Act of 1788. Because,

Secondly—It is the only construction that can make the words answer to the apparent, if not professed, object of the Act to raise supplies, in the usual way, by rates or taxes, upon things, rights, and profits, already protected and realized.

Thirdly—It is the only construction that can couple the Act for raising the brokers' tax with the Act of 1788, which has usually formed the exponent of all our tax Acts, and made the taxes laid relate back to the first of October preceding. And,

Fourthly—The words used constitute the common phraseology of our tax Acts, in similar cases, and have been before construed in practice, to make the assessment relate back to the first of October.

For instance, take the fourth tax laid by the very Act of 1839. "Thirty cents ad valorem," &c., "on lots," &c., "on which buildings *may be erected.*" No one has questioned the retrospective meaning of these words, and the established construction is, that the tax is laid on buildings erected before the first of October last past." Does not the use of words make the law of their construction? How, then, I ask, can it be, that "sales," &c., "which can be made," mean sales that *shall* be made after passing the Act? Will the Court, by a new construction of such words, put it at the discretion of every householder in a town or village, to avoid the present tax upon his building, by submitting, that the tax is only on buildings that *shall* be erected, and thus make the exception introduced by the Act itself, in Allen's case, the common rule for the tax collector, in all his assessments of houses, "which may be erected?" Will the Court instruct him to read the sentence as if written—shall be erected? What a practical illustration would we have that revenue laws are to be construed favorably for the State revenue! And what would become of the argument for uniformity?

But, if we want additional reason for the usual construction of the words, "may be erected," or "may be made"—have we not what is
427] wanted, in the principle, that taxes are commonly laid, and ought to be laid, upon rights that have been already enjoyed, under the protection of government? If this be a sound principle for raising revenue by taxation, does it not lead us, as by the hand, to the retrospective operation of the words, "sales which may be made."

Upon the whole, then, in this case, so important in its principles—disabusing my understanding of the excitement caused by a new and high, and, perhaps, unwise tax, and releasing it from authority, I can perceive no penalty, and nothing repugnant to the constitution, in the tax laid on brokers. Nor can I discover that it differs from other similar taxes, in the time of its assessment. And the conclusion follows, that the decision granting the prohibition, should be reversed; and that the relator be required to declare in prohibition, in order to try the fact whether he

was a broker, within the meaning of the Act. This he denies; and he must be heard upon the question of fact. For, in this, Mr. Carter is under the 9th article of the constitution. And the tax will attach, or not, according to the verdict that shall be rendered, upon the question, is he, or not, a broker or agent, within the meaning of the Act.

JOHNSTON, Ch., signed neither opinion.

See *City Council ads. Weston*, Harp. 340; reversed 2 Pat. 449, or 8 Curt. 171; *Birney* vs. *Tax Collector*, 2 Bail. 654; *Bulow* vs. *City Council*, 1 N. & McC. 527; *Copes* vs. *City Council*, 10 Rich. 495, and cases there cited; *State Bank* vs. *City Council*, 3 Rich. 342; *State ex. rel., Ravenal et al.* vs. *City Council*, 4 Rich. 286; *State ex rel., Sebring et al.* vs. *City Council*, 5 Rich. 561; *State ex rel. Adger* vs. *City Council*, 2 Sp. 719; 4 Strob. 217; McMul. Eq. 144; 2 Sp. 491, 623; 10 Rich. 104, 240, 474. *An.*

APPENDIX TO VOL. I.

*429] *It has happened, from time to time, that cases which should have been reported, have, from accident or other cause, been omitted by my predecessors. In the course of a few years past, they have swelled to a considerable number, many of them containing decisions of much importance. At the request of their Honors, with an expense of some time and labor, I have collected, prepared, and now publish these cases; and trust that in doing so, I render a service which will be acceptable to the profession and the State.

J. J. McMULLAN.

CASES AT LAW

FROM 1835, TO DECEMBER, 1840.

NOT HERETOFORE PUBLISHED.

THE BANK OF THE STATE OF SOUTH CAROLINA *vs.* JOHN BOWIE. (*a*)

A verdict for a specified sum of money, "with interest thereon from the 16th February, 1836," is not void for uncertainty, either as to the principal sum or the interest; but the plaintiff is entitled to sign judgment for both, computing the interest according to the verdict; even if the demand be unliquidated.

Before EARLE, J., at Barnwell, Spring Term, 1839.

John Bowie had been the agent of the Bank, at Aitkin, and had entered into bond, with several securities, for the faithful performance of his agency. Separate actions were brought against them, and a verdict was rendered for the plaintiff in these words: "We find for the plaintiff the sum of eleven thousand seven hundred and twenty-one dollars and eleven cents, with interest from the 16th February, 1836."

On the return of a rule to show cause, it was moved by Mr. Bellinger, for the defendant, to set aside the judgment, which was signed for the entire sum of principal and interest, according to the verdict, as irregular and void, for the excess over $11,721 11, unless the same should be remitted by the plaintiff. The motion was refused; and a motion was made in the Court of Appeals to reverse that decision.

*Appeal determined at Charleston, February, 1840. [*430

Curia, per EARLE, J. When this motion was made in the Circuit Court, I thought there was something in it more entitled to consideration than I now find. I learn, on conferring with my brethren, and also from the bar, that this form of verdict is in very general use, and that it has not heretofore been questioned. So many rights have become vested under this form, that it would be extremely prejudicial to shake it, even if there were greater difficulty on the ground of principle than I think there is.

A verdict must find the fact in issue; and if for the plaintiff, must assess his damages, if they be the subject of the action. It is said in Com. Dig. Pleader, "the verdict must find the fact clear to a common intent;" and elsewhere that "certainty to a common intent is sufficient." It would be idle here to enter into the distinctions between the different kinds and degrees of certainty required in pleading, which a learned Ch.

(*a*) S. C. again, 3 Strob. 439.

Justice, in England, once denominated "senseless jargon." It will be enough if the verdict here shall be found sufficiently certain to enable the Court to render judgment upon it.

It is said, (Com. Dig.) "A verdict is bad in ejectment for four acres of land, if it find the defendant guilty of eight pieces of land, without other certainty; and in an action on a penal statute, which gives a penalty for every offence, if it find the defendant guilty, contrary to the statute, but do not say how often he is guilty." If the jury, in the former case, had found the quantity in each of the eight pieces of land, or in the latter how often the defendant was guilty, the Court might have given judgment, for the means of removing the uncertainty would have been furnished. So in *Windham's* case, decided this term, a verdict of guilty only, on an indictment against the defendant, for stealing twenty head of cattle, was held to be bad. Suppose an action *qui tam* were given in such a case, and on the trial the jury should find for the plaintiff, and that the defendant stole ten head of cattle; the amount of the recovery is rendered certain enough; and the Court would only direct the clerk to compute the sum from the finding of the jury.

The objection here is, that the demand of the plaintiff was not liquidated; that the jury could only give interest by way of damages, and they have not so allowed it. The case was one in which it was clearly proper that interest should be allowed The jury have found for the plaintiff on the issue, and although they have not assessed a specific sum for his entire damages, yet they have furnished certain data by which the Court can, with the same facility, ascertain the amount, as in the case of a promissory note, on which there is judgment by default, and it is referred to the clerk to compute. They have ascertained and assessed the sum for which the defendant was liable, on the 16th February, 1836, from which date
*431] they *allow interest, and the Court has only to direct the clerk to compute the interest.

This Court perceives no sufficient ground to set aside the judgment, although it is a more regular and better practice to find a round sum; where the demand is not liquidated. Motion refused.

In the other cases against the securities, the same motion was made and likewise refused.

See Sup. 302. *An.*

NOTE.—In *Harrison* vs. *Allen*, (2 Bing. 4,) the verdict was for £196, with interest from March, 1819, and no objection taken in point of form; and the same form of verdict will be found in 4 Munf. 37, without exception, although there was an appeal on other grounds.

REPORTER.

THE BANK OF THE STATE OF SOUTH CAROLINA *vs.* JACOB C. LEVY.
THE BANK OF CHARLESTON *vs.* THE SAME.

To enable a garnishee in attachment to retain the goods in his hands, it is not necessary that he should prove himself to be a creditor entitled to bring an action; it is enough if he establishes a lien, even for outstanding liabilities incurred for the defendant, and absent debtor, which creates a special property, until discharged, and overreaches the claim of the attaching creditor. (*a*)

An agent here, who, for a commission, negotiates exchanges for a house in New York, who buys bills on Europe for them, and to raise the funds for that purpose, draws and sells bills upon them at home for corresponding amounts, some of which they accept, and others do not, and the bills are protested, such agent, on the failure of the principal house, has a lien on any funds or securities which come to his hands for his principals, to secure himself against these outstanding liabilities, although in fact he may not have paid any of the bills.

And there is no difference between bills accepted and not paid, and bills not accepted. The lien extends to all equally. Nor does it make any difference, that the funds and securities come to hand after the liability is incurred, and therefore were not looked to as an indemnity at the time.

Before EARLE, J., at Charleston, May Term, 1839.

On the 13th day of April, 1837, the Bank of the State of South Carolina sued out an attachment against J. L. & S. Joseph & Co. The Bank of Charleston also sued out an attachment against them; both [*432 made returnable to May Term, 1837, and copies thereof were duly served on Jacob C. Levy, as garnishee who, on the first of January, 1838, made the following return, on oath:

"Personally appeared the said Jacob C. Levy, of Charleston, merchant, on whom copies of the writs of attachment in these cases respectively have been served, who, being duly sworn, maketh oath and saith, that he has not now, nor had at the time of service on him of the said copies of the said writs, or either of them, nor has he at any time since had in his hands, custody, possession, or power, any moneys, goods, chattels, debts, books of account, lands, leasehold estates, and chattels real, belonging to the above named J. L. & S. Joseph & Co., or either of them, or in which they have, or either of them has, any right, claim or property whatsoever; save and except that at the time of the service on him, the said Jacob C. Levy, of the copies of the said writs of attachment against the said J. L. & S. Joseph & Co., he, the said Jacob C. Levy, held in his hands sundry accepted bills of exchange, promissory notes, securities, and other property specified and set forth in a schedule hereunto annexed, subject to his claims as creditor, in possession, and as collateral security for, and on account of, purchases made, moneys advanced, and responsibilities incurred, by him, the said Jacob C. Levy, for the said J. L. & S. Joseph & Co., and on account between the said J. L. & S. Joseph & Co., and him the said Jacob C. Levy. That they, the said J. L. & S. Joseph & Co., are justly due and owing to him, the said Jacob C. Levy, in the full and just sum of two hundred and five thousand two hundred and nineteen dollars, ninety-three cents, for purchases made, moneys advanced, and responsibilities incurred, by him, the said Jacob C. Levy, for them, and on an account between them and him, the said Jacob C. Levy. That since the service on him, the said Jacob C. Levy, of the said copies of the said writs of attachment, some of the said bills of exchange and promissory notes so held by him, the said Jacob C. Levy, have been paid, to the amount of seven thousand six hundred and thirty-four dollars, forty-seven cents; and that since the service on him, the said Jacob C. Levy, of the said copies of the said writs of attachment, he, the said Jacob C. Levy, has absolutely assigned, transferred, and delivered all the moneys

(*a*) See 1 Rich. Eq. 360.

collected by him as aforesaid, amounting to seven thousand six hundred and thirty-four dollars forty-seven cents, and the remainder of the said bills of exchange, promissory notes, securities, and other property, in the said schedule hereunto annexed mentioned, to Robert B. Gilchrist, under a deed of assignment to him, of the twenty-ninth day of September last, in trust for the creditors of him, the said Jacob C. Levy, according to the trusts declared in the said assignment, duly proved and recorded in the office of the Secretary of State, in Charles-
*433] ton aforesaid, in *the books of miscellaneous records, 5 U. S. page 47, forty-seven, to 55, fifty-five, and hereby specially referred to as part of this return."

To this return of the garnishee, the plaintiffs in attachment filed their suggestions, expressing their dissatisfaction with, and denying the truth of, the return as made by the garnishee, of the indebtedness of the said Josephs & Co. to him, the said Jacob C. Levy; in the sum of money expressed in said return; and also denying the right in law, as claimed by him, the said Jacob C. Levy, to retain the said moneys and securities, for payment of money as creditor of the said J. L. & S. Joseph & Co., in possession; and the indebtedness of the said J. L. & S. Joseph & Co., to the said Jacob C. Levy, in any sum exceeding or equal to the value of the moneys, and securities for the payment of money, so levied on and attached.

Pending these suggestions, the garnishee, Jacob C. Levy, filed his declaration as creditor in possession, pursuant to the attachment Act, and annexing an account current between himself and the said J. L. & S. Joseph & Co., in which the said J. L. & S. Joseph & Co. were debited with sterling and other foreign bills of exchange, purchased by the garnishee, Jacob C Levy, on their account, and transmitted to them, with the commissions and other charges, to the amount of four hundred and thirty-two thousand, four hundred and twenty-one dollars, twenty-five cents; and credited with bills drawn by the garnishee on, and paid by, the said J. L. & S. Joseph & Co., at maturity, and the proceeds of paper and other funds remitted by them to Jacob C. Levy, the garnishee, amounting to two hundred and twenty-seven thousand two hundred and one dollars, thirty-two cents.

On the 11th June, 1839, a verdict had been rendered in that proceeding in favor of the said Jacob C. Levy, to the amount of two hundred and five thousand, two hundred and nineteen dollars, ninety-three cents, with interest from the 25th of April, 1837, being a balance due on the aforesaid account, on which verdict judgment has since, to wit: on the 15th June, 1839, been entered up for two hundred and thirty-seven thousand and thirteen dollars, seventy-eight cents.

On the trial of the suggestions, the garnishee introduced this recovery in evidence; also, sundry letters from the said J. L. & S. Joseph & Co. to the said Jacob C Levy. In one of these letters, dated 20th April, 1837, the Josephs & Co express the most anxious concern on account of the situation in which the garnishee, Jacob C. Levy, had been placed, by his agency in their affairs, portraying their own sinking condition, and the small hope which remained of meeting with relief. In reference to the garnishee, Jacob C. Levy, they say: "We are happy that you have the means in your power to protect yourself, as far as the paper goes which is in your hands for collection; the proceeds of that paper, you will apply to the liquidation of the claims against you and ourselves,

arising from your drafts." The debit side of the account of the garnishee, Levy, was not disputed by *the plaintiffs, at the trial of the suggestions, but it was contended by them that the Josephs & Co. [*434 were entitled to be credited in that account with the bills of exchange drawn by Levy on them, accepted by them, and dishonored at maturity, and protested bills and notes discounted in Charleston, with the endorsement of Levy, and unpaid at maturity; and a paper was adduced in evidence by the plaintiffs, submitted by the defendant, at their request, containing a statement of bills drawn by J. C. Levy on J. L. & S. Joseph & Co., protested for non-payment, for which the said J. C. Levy had placed funds in their hands; the said J. L. & S. Joseph & Co. being credited with the amount of the said bills at the time they were drawn, and the same afterwards withdrawn from the account current between the said parties when the said bills were dishonored, amounting to $179,506.64; and a statement of protested bills and notes discounted in Charleston, with the endorsement of J. C. Levy, for the nett proceeds of which J. L. & S. Joseph & Co. were credited on account current, at the time of discount, and the same withdrawn from the account current, said bills and notes being unpaid at maturity, amounting to $19,647.02. In that paper was also contained a statement of bills drawn by J. C. Levy on J. L. & S. Joseph & Co., protested for non-acceptance and non-payment, for which the said J. C. Levy had placed funds in their hands; the said J. L. & S. Joseph & Co. being credited with the amounts of said bills, at the time they were drawn, and the same afterwards withdrawn from the account current between the said parties, when the said bills were dishonored, amounting to $5,407.29, and refused acceptance by the said J. L. & S. Joseph & Co. It was admitted at the trial of the suggestions, that the same were properly withdrawn from the account current between the said parties, and the said J. L. & S. Joseph & Co. properly chargeable with the amounts thereof; and the only question as to the mode of stating the account current between the parties, was, whether the said J. L. & S. Joseph & Co. should be credited with the amounts of bills drawn on them by J. C. Levy, accepted by them, and dishonored at maturity; and the amounts of the protested bills and notes discounted in Charleston, with the endorsement of J. C. Levy, and unpaid at maturity. It was further contended on the part of the plaintiffs, that J. C. Levy, in his transactions with J. L. & S. Joseph & Co., acted only in the capacity of an agent; and to show this, several letters from J. C. Levy to the Bank of the State, were read in evidence. The first letter, of April 7th, 1837, contains this clause: "I yet hope that having acted virtually as their agent, always depending on the wealth of that house, that in good faith, some discrimination may eventually be made by them to protect the drafts drawn by me, for which full remittance was always made, previously, or on the day they were drawn, up to the last hour, all of which was done for a commission that looked to the labor only, without reference to risk." In the letter of June, 1837, he says, "for a very small *commission*, I have *incurred the whole of my *liabilities;* and have never participated in [*435 any gain, or expected profits from the heavy operations that passed through my hands."

The presiding judge was of opinion that the garnishee could not be

considered as a creditor in possession, in regard to the bills accepted and protested for non-payment, inasmuch as he had in fact paid nothing on them himself. That until such payment, the Josephs & Co., could not be said to be indebted to the garnishee, in the meaning of the attachment Act. In regard to the unaccepted bills, he thought it might be held otherwise. Under these instructions of the Court, the jury found that the garnishee was a creditor for the amount of the unaccepted bills, but not for the bills protested for non-payment. The finding of the jury is in these words: "We find that the garnishee is a creditor in possession, to the amount of six thousand and sixty-six dollars and seventy-seven cents, and that the residue of the funds specified in his return, were the property of the absent debtors, at the time when the attachments were levied."

The garnishee moves for a new trial, on the following grounds:

1. That his Honor erred in the opinion expressed by him to the jury, that the defendant, in the transactions between himself and J. L. & S. Joseph & Co. acted only as their agent; and that whether he acted in that capacity or not, he was not entitled, under the *attachment law*, to retain the funds in question as creditor in possession, beyond the amount of his unaccepted bills, drawn by him on the said J. L. & S. Joseph & Co.

2. That his Honor erred in his charge to the jury, when he stated that the defendant could not recover against J. L. & S. Joseph & Co. on the account stated by him, because the said J. L. & S. Joseph & Co. had accepted the domestic bills drawn by the defendant, which were dishonored at maturity; and that the defendant could maintain no action against the said J. L. & S. Joseph & Co. on the said stated account, until he paid the said domestic bills accepted as aforesaid.

3. That the verdict of the jury was contrary to law and evidence, in this, that as it was proved that the defendant was responsible for a large amount of domestic bills drawn by him on the said J. L. & S. Joseph & Co. accepted by them, and dishonored at maturity, his Honor should have charged the jury, and the jury find accordingly, that the defendant had a lien on the fund attached, to indemnify him for his responsibility.

4. That a banker has a general lien on funds in his hands, to secure him for his advances or liabilities for the absent debtor, which cannot be defeated by an attachment.

5. That a factor or agent has the same lien, to the same extent as a banker.

*436] *6. That a lien on funds, to secure for responsibilities, cannot be defeated by an attachment.

7. That the verdict of the jury was, in other respects, contrary to law and evidence.

Appeal determined at Charleston, February, 1840.

Curia, per GANTT, J. Two principal questions arise in this case. The first is, whether, by the general law, the garnishee, as a creditor in possession, has a right to retain the securities in his hands for the general balance of his account against the Josephs & Co.? And if so,

2. Has the attachment Act deprived him of that right?

The garnishee, in the argument in these cases, has been designated by various appellations, such as banker, bill broker, factor and agent. Judging, however from the nature of the transactions which he carried on for the Josephs & Co., the most appropriate designation of the character in which he acted, would be that of bill broker. Whatever the name may be, by which he ought to be distinguished, I feel very confident

that he was of that class of persons privileged by the common law and the usages of trade, to retain the securities in his hands as creditor in possession, on account of the responsibilities which he had brought upon himself in the direct line of his agency for the Josephs & Co., for whom he acted.

Whitaker in his treatise on Liens, p. 35, says, that bankers have a lien on all paper securities in their possession, for the general balance of their accounts. And at page 89, he reiterates the same position, with this addition, "not only for debts accruing on the particular account for which the securities were deposited, but also, for a general balance due to them on other accounts from the same employer."

Selwyn, whom I esteem as amongst the most accurate of authors, in treating of the defence to the action of trover, says, "The most usual defence to this action is, that the defendant has a lien on the goods, or a right to detain them." And then proceeds to inquire under what circumstances a party may insist on this defence. Among a great variety of persons who are entitled to a general lien, in respect of a general balance of account, in speaking of bankers, he says, "So where a banker has advanced money to a customer, he has a lien upon all the securities which come into his hands, belonging to that person, for the amount of his general balance; unless there be evidence to show that he received any particular security under special circumstances, which would take it out of the general rule." And he refers to the case of *Davis* vs. *Bowsher*, 5 Term Rep. 488, sec. 2; Selwyn, p. 1287, 1288.

In 2 Livermore, p. 34, it is said, "The law gives to the agent a qualified right over the property of his principal, in his possession, to hold it until* payment is made of what he is entitled to receive." This right is denominated a lien, and is defined to be "a right in [*437 one man, to retain that which is his possession belonging to another, until certain demands of him, the person in possession, are satisfied."

In the case of *Kruger* vs. *Wilcox*, reported in Ambler, p. 252, the following is the marginal note of the case. "A factor gains a lien on goods consigned to him from his correspondent, for the balance of his account, as well as for the duties, &c., and may retain for such balance; but if he parts with the possession of the goods to the owner, he loses the lien for the balance of accounts." Lord Hardwicke says, in giving the judgment of the Court, "This is a case of bankruptcy, in which this Court always inclines to equality; yet, if any person has a specific lien, or a special property in goods, which is clear and plain, it shall be reserved to him, notwithstanding the bankruptcy." And Livermore, p. 38, that "Since this case, which was in 1755, it is settled that a factor has a lien upon goods consigned to him, as well for his general balance, as for the incidental charges attending the particular goods in his hands; and that it is in favor of commerce, for the convenience of trade, and with a view to encourage them to advance money upon goods in their possession, of which must come to their hands as factors, that their right of lien has been allowed and so much favored; and that this lien upon the goods of his principal, is not only for the general balance of his account and for his advances, but also, for the amount of any sum for which he may have become security for his principal." To show that the lien extends to a case of suretyship, by the factor or agent for his

principal, the case of *Drinkwater and another*, assignees of *Dowding*, (a bankrupt,) against *Goodwin*, reported in Cowper, 250, is referred to. I have examined the case, and the opinion of the Court, as delivered by Lord Mansfield. To avoid prolixity, I insert only the principle decided, which is, "that a factor who becomes surety for his principal, has a lien on the goods sold by him, for his principal, to the amount of the sum for which he has so become surety."

Paley on Agency, (at p. 109,) says, "It is now fully settled, that a factor has a lien upon each portion of goods in his possession, for his general balance, as well as for charges arising upon these particular goods:" and adds, that since the case of *Kruger* vs. *Wilcox*, (which I have before referred to,) it has never been controverted, but is now received as a known principle of law, too clear to be disputed; and that this lien attaches, not only upon the goods in specie, but upon the proceeds and securities received in the course of his business; and he refers to a variety of authors in support of these positions. Cowper, 251 and 225; 2d East, 227; 3d B. & P. 489; and Willes, 400. If, then, the positions adverted to be correct, no doubt it follows, undeniably, that the garnishee in the cases before us, as the agent of the Josephs & Co., *438] had a qualified right of *property in the securities of the Josephs & Co. in his possession; and there is nothing in the circumstances of these cases to deprive him of the benefit of that lien which the law invests him with. The right is derived to the garnishee from the liabilities incurred, in virtue of his agency and transaction of business for the Josephs & Co., and which, from the return made by him as garnishee, exceeds, very far exceeds, the amount of the funds of which he had possession, and which constitute the subject matter of these issues. The garnishee had a right, as creditor in possession, to retain these securities, until the liabilities which he had brought upon himself by his agency for the Josephs & Co. were removed.

To the credit of the garnishee, nothing of unfairness in the various transactions in which he has been engaged for the Josephs & Co., as their agent, is either imputable or imputed to him. He has, indeed, been charged with a want of caution, in making himself responsible for the Josephs & Co., when he might have avoided such responsibilities by affixing his name in these transactions as agent merely. On this head, there are no specific proofs adduced; the presumption is, that it was required of him to act in the premises as he has done. And the general disappointment produced by the failure of the Josephs & Co., may, it is to be hoped, lead to more caution with all parties in future. The right of the garnishee, as creditor in possession, being thus fully recognized, we are to enquire,

Secondly, whether, by the terms of the Attachment Act, the right has been taken away from him. This will depend, exclusively, upon the construction to be given to the seventh clause of the Act, in the following words. "But if the person or persons so summoned, shall appear at the return of the writ, and lay claim to the said moneys, goods, chattels, or other things, and, upon oath, deny the same to belong to the absent debtor, or that he hath any moneys, goods, chattels, debts or books of account belonging to the absent debtor, if the plaintiff shall rest satisfied therewith, then the said attachment shall be discharged; but if not, then

the claimant or claimants, or person or persons, so summoned as aforesaid, shall be put to plead the same, and the matter shall be tried by a jury forthwith, &c. And the party that shall be cast in the same, shall pay to the prevailing party such reasonable costs and charges as shall be allowed and taxed," &c.

This clause of the attachment Act, was intended to advance, not abridge the rights of the garnishee. His claim to the funds in his hands, made by his return, is conclusive, unless the plaintiffs can show that there is no foundation, in fact or in law, for the claim. This cannot be done, for the lien is undeniable. The creditors can be in no better situation than the Josephs & Co. Would they be permitted to recover in trover, without paying the liabilities of the garnishee? Unquestionably not. The clause in the attachment Act, giving to a creditor in possession the right to *declare for his debt, was not intended to abridge any [*439 common law right which existed. It may furnish, in many instances, a cumulative remedy. It has no reference to the garnishee's lien. This is secured to him, although there be not any present indebtedness for which he could maintain an action. It stands in the place of a remedy by action, and it is only necessary to show, by the relation of confidence between the parties, the garnishee has made advances or incurred liabilities, for which the funds in his hands may be necessary as an indemnity, and then the lien attaches. It is not necessary that the insolvency of the Josephs should be shown; the creditors are in their place; and if the Josephs could not recover the funds without paying the liabilities incurred by the garnishee, it follows, that the plaintiffs cannot defeat his lien, or put him to the proof of an actual present indebtedness.

I see nothing in the act to deprive the garnishee of his lien on the securities in his hands, for the liabilities incurred as the agent of the Josephs & Co., and the jury, under the charge of the presiding judge, having by their verdict, infringed upon the garnishee's rights, a new trial should be granted.

RICHARDSON, O'NEALL, and BUTLER, JJ., concurred.

EARLE, J. I am satisfied that I took an erroneous view of the attachment Act, when I held, below, that the garnishee could not retain the property, unless he was a creditor entitled to bring an action. I have no doubt that there may exist a lien where there is no legal debt; and such a lien under the first section of the Act, would give a special property, which would enable the garnishee to hold.

I think too, that I was mistaken in supposing that the garnishee, here, puts his right to retain, altogether on the ground of being a creditor in possession. His return is susceptible of a different construction, and may well sustain his claim, if that be founded in law.

That is the important question; and although I agree that the case ought to go back for a new trial, I am not satisfied to lay down the law as broadly as the court has resolved to do.

Since the case of *Kruger* vs. *Wilcox*, it has not been questioned that a factor has a lien for a general balance; and later cases have allowed such lien for outstanding liabilities. This general proposition, although broadly laid down by Paley, Livermore, and Story, in their several

treatises, is derived from the cases of *Drinkwater* vs. *Goodwin*, (Cowper, 251,) and *Hammond* vs. *Barclay*, (2 East. 257.) They are the cases cited in all the compilations where that rule is laid down. And I think that they do not sustain the lien of the garnishee here. Other cases have likewise been relied on, *Pulteney* vs. *Keymour*, (3 Esp. N. P. Ca. 182;) *King* vs. *Lee et al.*, (6 Pr. E. R. 269.) *Mecker* vs *Wilson*, (Mass. Rep.) *Ingersall* vs. **Vanbokkerlin*, (7 Cowen R. 270.) some English and some American, to establish the same proposition. But when examined, they will not be found to touch the point made in this case. They are all cases where the responsibility has been incurred on the credit of the particular goods on which the lien was claimed. They are cases of acceptances given upon consignments made or promised; and the leading case, that of *Drinkwater* vs. *Goodwin*, was decided by Lord Mansfield, on the ground of express contract. *Hammond* vs. *Barclay*, was a case of acceptance given upon the consignment of a ship and cargo; so was *Pulteney* vs. *Keymour*. And the obvious distinction between all that class of cases, and this, will be made manifest by the marginal note. "If a broker advances money, and gives his acceptances, on the credit of goods lodged in his hands, the owner cannot demand them without full indemnity" So in *The King* vs. *Lee*, the point decided is, that a factor to whom goods have been sent for sale, and who has accepted bills of exchangs, drawn on him by his principal, to the amount of their value, has a lien upon them. An accumulation of authorities to establish so plain a proposition, as that a factor has a lien for a general balance, and that an attachment will not overreach an actual lien when it exists, was hardly necessary. Levy, the garnishee, does not stand upon that footing at all. And the question, whether he is entitled to a lien, may depend on facts yet to be ascertained. Lien or not, it is true is a question of law; but the facts out of which it may be claimed, are for the jury. Lord Mansfield said, in *Green et al.* vs. *Farmer et al.*, (4 Burr. 2221,) that the convenience of commerce and natural justice, are on the side of liens; and that courts lean that way, 1. Where there is an express contract; 2. Where it is implied from the usage of trade; or 3. From the manner of dealing between the parties; and 4. Where the defendant has acted as factor. There is nothing in this case to show that a lien arises on either of the grounds stated by Lord Mansfield. There was no contract, and no usage of the particular trade. The manner of dealing between the parties, leads to the opposite conclusion; and whether he be called factor, banker, or bill-broker, he has no lien, if it be manifest from the manner of dealing, that he never looked to an indemnity, and that he relied on the personal credit of his customers. Mr. Story, in his well digested treatise on the law of Agency, says, that "no lien will arise where there is an express agreement between the parties not to insist upon it; or where it is clear, from the whole transaction, that the party trusted to the personal credit of his debtor." Such is the language of Livermore, and Chancellor Kent; and such, also, is the positive language of Lord Mansfield, in *Green* vs. *Farmer*.

*440]

The whole correspondence between the Josephs and Levy, and the letters from Levy to the Bank, tend very strongly to show that he never

looked to an indemnity; that he relied solely on the wealth and personal credit of *the Josephs. Take his letter to the Bank, of the 7th April, and can anything be more explicit. "I yet hope, having [*441 acted virtually as their agent, always depending on the wealth of that house, that in good faith, some discrimination may eventually be made." "All of which was done for a commission, that looked to the labor only, without reference to the risk." And indeed their letter, of the 20th April, in which they say, "You have the means to protect yourself, so far as the paper goes which is in your hands for collection," seems to exclude the notion, that either they or he, up to that time, had any view to a lien, which would not have needed their authority to enforce.

The whole of his liabilities were incurred before the securities came into his hands. He, therefore, could not have looked to them for indemnity, because he could not anticipate that he would receive them. It would be just as reasonable to allow a lien to every endorser or security, who obtains accidental possession of the goods of his principal. How can it be supposed that he could have looked to a lien on securities for 40 or $50,000 yet to be received, when incurring liabilities to the amount of $400,000.

I cannot, therefore, unite with my brethren in saying, as matter of law, that Mr. Levy had a lien. Whether he was banker or bill-broker, it seems to me very obvious that he was dealing on their credit, or his own. If he looked to theirs, it is clear, on authority, that he has no lien; *a fortiori*, if he dealt upon his own, he can claim none.

This, however, is a question of fact which ought to be sent to the jury with suitable instruction. And such is my judgment.

In the case of the Bank of Charleston, I am satisfied that the letter of the Josephs, of 20th April, 1837, which was anterior to the attachment, constituted a valid transfer or assignment of the assets claimed. As garnishee, he had a right to claim and hold under that, against the attachment.

See *Martin* vs. *Solomon*, 10 Rich. 539; 6 Rich. 178. *An.*

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*Martin E. Munro *vs.* Edward R. Laurens. [*442

The rule of Court (*a*) which provides that a plaintiff who does not proceed to trial on the fourth call of his cause, or obtain a continuance, shall be nonsuited, is not only within the power of the Court, but is expedient and proper, and ought to be enforced.

In such case, where a nonsuit has been ordered, or the cause has been struck off the docket, the Court will not set aside the nonsuit, or restore the cause, at a subsequent term, on the affidavit of the plaintiff, that he was misled by the Clerk's order for judgment by default, and supposed that final judgment had been obtained, although his attorney may have died in the mean time.

Before Earle, J., at Charleston, May Term, 1839.

The plaintiff, several years ago, brought his action of assumpsit, and

(*a*) 19th Rule. Mill Company, 36.

on filing his declaration, as the defendant had entered no appearance, obtained an order for judgment by default, and the cause stood on the writ of inquiry docket. He took no further steps; and at May Term, 1838, the cause having remained five terms on the docket, his Honor, the presiding Judge, ordered it to be struck off. At May Term, 1839, the plaintiff moved to reinstate the cause on the docket, and to have leave to execute his writ of inquiry, on an affidavit, stating that the late Mr. Cross was his attorney, who died in 1836; that after his death, the plaintiff, on application to his administrator, obtained the record, with an order for judgment endorsed thereon, from which he supposed final judgment had been obtained, and therefore retained it in his hands, without further inquiry, until he made an assignment for the benefit of his creditors. The motion to reinstate the cause was refused; from which decision the plaintiff appealed, and renewed his motion in the Court of Appeals.

Appeal determined at Charleston, February, 1840.

Curia, per EARLE, J. In the argument, a wish was expressed that the Court would lay down some rule on this subject. It is only necessary for the Court to say, that it will adhere to the rule already adopted; for the plaintiff can take nothing by his motion, unless the Court departs from its own rule, and makes his case an exception. It is but reasonable that a plaintiff, who brings a defendant into Court, to answer to an action, should proceed to the trial of it, with all convenient dispatch; and this is required by positive law. To insure this end, the Court, in the exercise of the powers vested in it, has adopted the following rule: "If any issue, writ of inquiry, or summary process docketed, shall be called four Courts, and not tried, the plaintiff shall be called, and if he does not immediately go to trial, he shall be nonsuited, unless it shall appear that it had been continued at the defendant's motion, or other satisfactory cause shall be shown to the Court, on *oath, to prove it was not postponed from the plaintiff's neglect, or unless the plaintiff, at such fourth call, obtain a further continuance." The plaintiff's cause had remained on the docket, and had been called five successive terms, and at the fifth call was struck off. The defendant having entered no appearance, could make no formal motion for a nonsuit; but he was, nevertheless, entitled to the benefit of a rule, made, in part, for his protection from vexatious delay; although he had not thought fit to plead, yet he had a right to be heard on a writ of inquiry, so far, at least, as to see that the plaintiff proved his demand, and did not recover too much. It was fair to presume that he was there in Court for that purpose; not that he was a defaulting debtor, benefited by the delay, when the plaintiff, after five terms, failed to bring forward his proof. The rule is peremptory, and it is perhaps to be regretted that it is not more rigidly enforced.

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The Court perceives nothing in the affidavit, to induce it to restore the cause. It may be questioned whether the Court has the power. The order was not appealed from. The defendant was entitled to an order for nonsuit, or of *non pros.* as no cause was shown for further continuance; and under that state of the case, I should doubt the power of the Court to restore it. If it had, the cause shown is insufficient. It

amounts only to this, that the plaintiff's business was neglected, perhaps by his attorney while alive, certainly by himself since.

The decision below is affirmed.

GANTT, RICHARDSON, O'NEALL and BUTLER, JJ., concurred; EVANS, J., absent.

Phillips, for the motion. *Bailey*, contra.

See 1 Bay, 31. *An.*

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*WILLIAM ALSTON *vs.* THOMAS MCDOWALL. [*444
THE SAME *vs.* WILLIAM O. CLARKE.(*a*)

Although an actual possession of twenty years will raise the presumption of a grant, yet, where the plaintiff made a survey of many contiguous tracts, with the intermediate and dividing boundaries distinctly represented on the plat, doubted whether a possession of twenty years on one only of the several tracts would raise the presumption of a grant to all the lands included within the survey.

In such case a plaintiff cannot rely on a possession of twenty years on one of the tracts, to raise the presumption of a grant to himself of all the lands contained in the survey, when he produces original grants to others for several of the tracts, (being those in dispute,) of a date anterior to the commencement of his possession.

The defendants being in possession of these, and the plaintiff having produced the original grants, he must show that he has acquired the title of the grantees by conveyance, by adverse possession, or such possession, with other proof, as would raise the presumption of a conveyance.

An entry for the purpose of survey, will not create the bar of the statute; nor will such entry, together with the possession of the grant, without other proof, raise the presumption of a conveyance from the grantees.

The defendants being in actual possession of the tracts so granted, of which the plaintiff never had possession; *held*, that the plaintiff could not recover without proof of title.

Before EARLE, J., at Horry, Fall Term, 1838.

These were actions of trespass to try titles to several tracts of land.

The plaintiff gave in evidence, an original grant to John Alston, for two hundred and forty-three acres, dated the 4th June, 1735; a grant to Daniel Dwight for one thousand and eighty-five acres, dated 3d September, 1735; and a grant to Andrew Broughton for two hundred and twenty-seven acres, of the same date. These tracts were identified by a surveyor, and a trespass was proved by McDowall on the two former tracts, and by Clarke on the latter.

The plaintiff then offered in evidence a plat made by William Hemmingway, a surveyor, on 25th August, 1797, of seven contiguous tracts of land, containing three thousand five hundred and forty-one acres, as the property of the plaintiff, with these remarks and references in the margin. "A. Granted to Thomas Brown, November 29, 1735, for one hundred and twenty-nine acres. B. Granted to John Oldham, June 26, 1736, for three hundred acres. C. Granted to William Alston and Thomas Brown, November 28, 1735, and June 26, 1736, for six hundred and thirty acres. D. Granted to Andrew Broughton, September 3, 1735, for two hundred and twenty-seven acres. E. Granted to Rev. Daniel Dwight, September 3, 1735, for one thousand and eighty-five acres. F. Granted to John Alston, June

(*a*) See *Alston* vs. *Collins*, 2 Sp. 450. *An.*

4. 1735, for two hundred and forty-three acres. G. Is four hundred and sixteen acres surveyed for Col. Alston, August 25, 1797;" with this further certificate in the margin. "A plan of three thousand five hundred and forty-one acres of land, the property of Col. William Alston, by an actual survey made August 25, 1797, by William Hemmingway, surveyor." See annexed plat.

*445] *A plan of three thousand five hundred and forty-one acres of land, the property of Col. William Alston, by an actual survey, made August 25, 1797, by William Hemmingway, surveyor.

A. Granted to Thomas Brown, November 29, 1735, for one hundred and twenty-nine acres.

B. Granted to John Oldham, June 26, 1736, for three hundred acres.

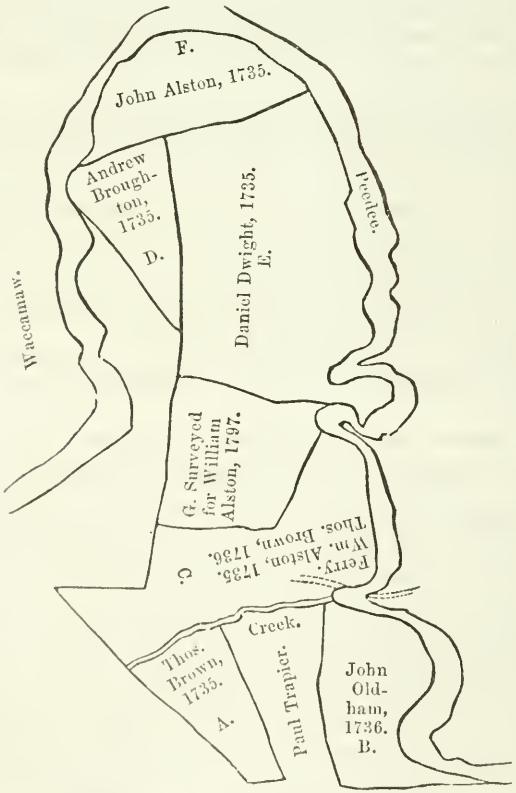
C. Granted to William Alston and Thomas Brown, November 28, 1735, and June 26. 1736, for six hundred and thirty acres.

D. Granted to Andrew Broughton, September 3, 1735, for two hundred and twenty-seven acres.

E. Granted to Rev. Daniel Dwight, September 3, 1735, for one thousand and eighty-five acres.

F. Granted to John Alston, June 4, 1735, for two hundred and forty-three acres.

G. Is four hundred and sixteen acres surveyed for Col. Alston, August 25, 1797.



It was proved that James Newton occupied a house at the ferry, with a small field, on the tract C; that he was put in possession by the plaintiff; with authority and directions to look after other lands of the plaintiff in the neighborhood, and

to see that no trespasses were committed upon *them; that this possession continued, with the exception of short intervals, when others took his place, [*446 for upwards of twenty years before suit brought. It was further proved, that the plaintiff was in the habit of cutting timber on the ferry tract, for the use of his plantations; but no actual occupation or possession was proved in either of the three tracts granted to John Alston, Dwight and Broughton, and no act of ownership, except that of making the survey in 1797.

The plaintiff offered in evidence no conveyance or other derivation of title, from either of the grantees of those tracts, which alone were in dispute, and relied on the general plat, with the possession of twenty years at the ferry as sufficient.

The Circuit Court, on a motion for a nonsuit, was of opinion that this was not enough to confer title to the several tracts in dispute, the original grants of which were produced; and the plaintiff was nonsuited.

A motion was now made to set aside the nonsuit, and for a new trial. It was first argued at February Term, 1839, when it stood over, and was ordered to be re-argued at February Term, 1840, when the judgment of the Court was delivered by

EARLE, J. The claim of the plaintiff to recover in these actions, depends on principles which I had supposed to be well settled. There can be no doubt that an actual possession of twenty years, will authorize a jury to presume a grant, or in some cases a conveyance. (*a*) But the precise point which arises here, does not seem to have been made before. The plaintiff produces a plat made at his instance, by a public surveyor, in 1797. This is not a survey of a single entire tract, but of seven contiguous tracts, the intermediate boundaries of which are as distinctly marked out as they could have been in a separate survey of each, with a statement in the margin, that the different tracts have, in fact, been granted to different persons. Whether such a survey, with an actual possession on one only, for twenty years, would authorize the presumption of a grant to the plaintiff of all the land contained within the seven tracts, may well be doubted. But such a presumption cannot arise in direct opposition to the proof; the plaintiff cannot set up a grant to himself, to the whole of the lands contained in the survey, from a possession beginning in 1797, when he produces an original grant to another, for part of the lands, in 1735. Presumption, in aid of title, where there has been a long possession, stands in the place of proof; but it cannot supercede or overthrow it. And when the plaintiff has produced a grant to John Alston, to Daniel Dwight, and to Andrew Broughton, he must show that he has acquired their title. An adverse possession would have enabled him to do this; or such a possession, with other proof, as would authorize the presumption of a conveyance. Nothing short of an actual possession would answer either of these *ends. It must have been [*447 such a possession as would enable the real owner to sue. It is only upon his forbearance to sue, that the title is barred by the statute, in one case, or that the presumption of a conveyance arises in the other. (*b*) The possession, therefore, should have been actual, open and notorious; an occupation of the very soil, the title to which is alleged to be barred, or a conveyance of which is intended to be presumed. A mere entry for the purpose of survey is no such occupation. It might be regarded as a trespass, which would sustain an action; but it is not a continuous pos-

(*a*) 11 Rich. 425. *An.* (*b*) Supra, 354. *An.*

session, which would confer title. If the plaintiff had actually obtained a deed from John Alston, or from Dwight, or Broughton, such an entry and survey, with the possession at the ferry, might perhaps enable him to give it in evidence without proof, if thirty years old. But surely it would not dispense with the deed altogether.

A constructive possession follows the title, where there is no actual possession. It cannot be allowed to prevail against the title. The plaintiff had no actual possession of the tracts granted to John Alston, Dwight and Broughton. If they had the title, the constructive possession was in them; and if the defendants had produced the grants to them, they must have defeated the plaintiff's actions. It would seem strange to say, that a plaintiff may recover on proof, which, if produced by the defendant, would prevent him from recovering. This, it should be borne in mind, is not a case of an entry by force, and of actual eviction. The defendants did not enter upon the plaintiff, who had no such possession as would enable him to maintain trespass *quare clausum fregit*. *Pearson* vs. *Dansby & Nelson*, (2 Hill, 466.)

By the production of the grants to John Alston, Dwight and Broughton, he separated these tracts from the other lands in the survey, both in regard to title and possession. The defendants entered upon them as wild uncultivated lands, and were in possession. Since the case of *Faysoux* vs. *Prather*, (1 N. & M'C., 296,) it is well settled that a defendant in trespass to try titles, may defeat the plaintiff by showing title in a stranger. And it would be a total alteration of the law to say, that in such case a plaintiff may sustain an action by showing a better title than the defendant. He who has actual possession, not obtained by a tortious eviction, is to be regarded as the owner until a perfect title is proved. Whether the possession of the defendants was otherwise rightful, and under good title, it seems immaterial to inquire, as the plaintiff produced no other evidence of title than the possession of the grants, and a surveyor's plat, made at his instance. That would as well authorize the presumption of a descent cast, as of a conveyance. It is true, as stated by Mr. Starkie, "A jury may find in all cases, a grant, conveyance or release, or such cogent and legal, though circumstantial, evidence, as is sufficient to convince their minds that a grant or conveyance, essential to
*448] the transfer, according to the *nature of the property, has been actually executed." (3 Evid. 1225.) But here there is nothing in fact, to lay the foundation of such a presumption. The law presumes, from a long possession, that what ought to have been done has been done. *Arthur* vs. *Arthur*, (2 N. & M'C., 96.)

But there is no proof that John Alston, Dwight or Broughton, ought to have conveyed to the plaintiff; and no circumstance from which an inference can be drawn that they did convey; except the possession of the grants and the survey. And I apprehend, no case can be found, in which a conveyance has been presumed from such facts, where there has been no actual possession of the land claimed to have been conveyed.

A majority of the Court is of opinion that the nonsuit was properly ordered.

GANTT and RICHARDSON, JJ., concurred.

O'NEALL, J. In these cases, I differ from my brethren who sustain

the nonsuits. The plaintiff's plat, made by Hemmingway, August, '97, included the land on which the defendants have trespassed. This unquestionably defined the extent of the plaintiff's claim. His possession within it had constructive effect to the extent against every one, except the grants elder than that survey, and lying within it. As against them it would not create the bar of the statute. But the bar of the statute, and mere presumptions in fact, are very different things. His possession within that survey, including grants to other persons, for more than twenty years, and his adduction in evidence of those very grants, were circumstances from which a jury might have found the execution of the intermediate conveyances.

But I do not rest the case upon this view. For the plaintiff's possession under color of title, was enough to enable him to recover for a trespass committed within its limits by any one who had no title. Indeed, his possession put the defendants to the proof of title. For they entered upon him; and if he could have maintained trespass *quare clausum fregit* upon this proof, then it is, I think, equally clear, it was sufficient evidence of title to entitle him to go to the jury for the land and his damages. Possession under Hemmingway's plat at any point, was constructively a possession of all the land within it; and an entry by the defendants upon any portion of that survey, was a trespass upon the close of the plaintiff, and for this disturbance of his possession, he is entitled to damages, unless the defendants could justify. Bull, N. P., 103; Burn, 291; 2 Saund., 110; 2 J. R., 22; 10 J. R., 338.

This goes upon the legal notion that he who is in the possession of land, is the rightful owner. If this be true in one form of action, it must *be so in all. Reason and propriety dictate that this should be the conclusion of our Courts. He who invades a possession ought [*449 to show his right.

I think, therefore, the motion to set aside the nonsuits ought to be granted.

See *Binder* vs. *Bonbon*, 9 Rich. 26; *McColman* vs. *Wilkes*, 3 Strob. 480. *Rep.*

Charles D. Young *vs.* Alexander Watson.

In trespass to try titles, where the defendant has not acquired his possession by a tortious eviction, or actual disseizin, the plaintiff must make out a perfect title in himself.

It is necessary to show that the land has been granted, either by the production of the grant, or by proof of such possession in the plaintiff, or some one from whom he derives title, as will authorize the presumption of a grant.

A possession of sixteen years, which terminated in 1791, insufficient for that purpose; and the plaintiff producing no other title, was nonsuited.

Before Earle, J., at Charleston, May Term, 1839.

Trespass to try titles to certain lands on Acheson's Island and Washaw Creek, on Santee. The plaintiff claimed as heir at law of his father, and by descent from his grandfather, Charles Young, who died

about 1803. The title of Charles Young, the grandfather, was derived from Alexander Inglis, and to sustain it, office copies of the following deeds, under proof, deemed sufficient to entitle them to be read, were produced and read in evidence.

1. A deed of conveyance, dated the 8th of November, 1798, from Alexander Inglis and William Marshall, Executors of Alexander Inglis, deceased, to George Wagner, for the lands described in the declaration. The deed recited certain proceedings in Chancery, by the creditors of Inglis, to subject the real estate to the payment of debts, on which a decree was pronounced, directing a sale of the lands by the executors, and that they should make titles to the purchaser; and that the heir at law, and the devisees, should join in and confirm the titles within six months after attaining the age of twenty-one years, or show cause to the contrary. The proceedings in Chancery were not in evidence, and there was no deed of confirmation by the heir or devisee.

*450] *2. A deed of conveyance from George Wagner to Charles Young, dated 20th April, 1799, for the same lands.

It was proved by Mrs. Mary Brown, that Inglis owned a plantation on South Santee, called Washaw, but whether it embraced any land on Acheson's Island, she did not know. She understood that Mr. Wagner bought part of the plantation and Mrs. Horry a part. Mr. Inglis acquired his lands on Santee by marriage. He took possession of his wife's lands at the death of her father, in 1775, and had possession of them and cultivated them until his death, in 1791. She did not know that the land held by Inglis, was the same that is now in dispute.

The plaintiff relied on this proof of possession by Inglis, as sufficient to constitute title in him; or at least, as sufficient to enable him to recover in this action against the defendant, who showed no title. On a motion for a nonsuit, the Circuit Court was of a different opinion; without regard to the defect in the plaintiff's title, in not producing the proceedings in chancery, under which the sale was made by the executors of Inglis, and for want of the deed of confirmation by the heir and devisees.

Nonsuit ordered; which it was now moved to set aside.

Appeal determined at Charleston, February 1840.

Curia, per EARLE, J. What has been said in *Alston* vs. *McDowall*,(*a*) renders it unnecessary to say much here. The plaintiff, it is admitted, made out no title. And the defendant is not proved to have been a disseizor. The question made by the counsel in argument, did not arise. The endorsement which the plaintiff is required to make on his writ and declaration, gives character to this action, which is to try titles. I have not heard it doubted, that in such case, the plaintiff, where there has been no tortious eviction, could only recover on proof of good title. It would be of very little use to go back to the feudal system for the origin of land titles.—Whether or not the land in this State should, in point of law, all be presumed to have been granted, is a question of policy, which we need not consider, much less decide. There can be no acquisition of title against the State, except by grant, or a possession which will authorize the presumption of a grant. Less than twenty years will not answer that purpose. And a plaintiff can only make out a perfect title, by producing a grant, or by proving such a possession in himself, or some one from whom he derives title. A possession of sixteen years only,

(*a*) Sup., 444. *An.*

supposing it clearly proved to have been of the lands in dispute, which terminated fifty years ago, cannot stand in the place of title. It cannot be allowed to prevail against the actual possession of the defendant, who did not enter upon the plaintiff, and which, for ought that appears, may be as rightful as that which the plaintiff formerly held. Until the true title appears, we must regard the *actual possession, when not forcibly [*451 obtained, as the best evidence of it, and entitled to protection.

Motion dismissed.

GANTT, RICHARDSON and BUTLER, JJ., concurred.

O'NEALL, J. Where the plaintiff's possession, actual or constructive, is entered upon, I think that such possession is evidence of title to put the defendant to prove his title.(*a*) In this case, I understand the plaintiff or his ancestor never had possession, actual or constructive. I, therefore, am satisfied with the nonsuit.

Petigru and *Hunt*, for the plaintiff. *Mayzick* and *Memminger*, contra.

GOLDTHWAITE & EVANS *vs.* LEWIS H. BRYANT.

The right of property in goods attached, if claimed by the garnishee, or by another, may be tried in the form of a feigned issue, wherein the garnishee or other claimant is plaintiff, as well as in any other form.

Where a third person, not served as a garnishee, lays claim to the goods attached, and is allowed to come in with the privilege of a garnishee, and to make up a feigned issue as plaintiff, to try the right of property, whereby he gains possession of the goods, if he afterwards discontinue, and withdraw the record, he cannot then require a suggestion to be filed by the plaintiff in attachment, who is entitled to judgment against him as a defaulting garnishee.

Before EARLE, J., at Charleston, May Term, 1839.

A foreign attachment, at the suit of the plaintiffs, against the defendant, was levied on a mare at livery, and Matthews, the keeper of the stables, was made a garnishee. An order for sale was made, and rescinded at the instance of one Naylor, who claimed the mare, and he had leave to come in as garnishee, and contest the right of property. An issue was made up, and stood for trial When called, the attorney of Naylor moved for leave to discontinue, which being granted, he withdrew the record. Afterwards, during the term, a motion was made by the attorney of the plaintiffs in attachment, for leave to sign judgment against Naylor as *defaulting garnishee; which was resisted, upon the ground that [*452 Naylor having denied the right of property in the absent debtor, it was for the plaintiffs to become the actors in the suggestion, and to disprove the return. But the Circuit Court granted the order for judgment against him, which he moved the Court of Appeals to set aside.

Appeal determined at Charleston, February, 1840.

Curia, per EARLE, J. Whatever may be the correct practice in regard

(*a*) 3 Strob., 480. *An.*

to issues made up to try the right of property, under the attachment Act, it is unnecessary to determine. The practice has been very general, if not uniform, in Charleston, to do this in the form of a feigned issue, in which the party claiming in opposition to the attaching creditor, is the plaintiff. Such was the case here; and no doubt, the question can as well be tried in that form as any other. When Naylor came in and claimed title, he placed himself in the position of being an actor in the subsequent proceeding; he obtained possession of the mare, and rendered an action of trover unnecessary. The discontinuance was ordered at the instance of his counsel. If he had repudiated the issue, he could not have made that motion. By making it, he admitted himself to be the plaintiff in the proceeding; as having instituted, and as having a right to abandon it. Having discontinued, the condition on which he rescinded the order of sale was not complied with, and the parties must be restored to the position which they occupied when he interposed. He can claim no better position than Matthews, in whose place he was substituted, that of a garnishee in possession, admitting the right of the absent debtor. It would be productive both of hardship and delay, to allow him to shift his ground, and to have now all the advantages of an original garnishee, denying the right of the absent debtor; conceding, in such case, the correct practice to be, that the plaintiff in attachment should be the actor in the suggestion and issue

The judgment of the Circuit Court is affirmed.

GANTT, RICHARDSON, O'NEALL, and BUTLER, JJ., concurred; EVANS, absent.

Thompson, for the motion. *Bailey*, contra.

See 1 Rich., 460; 1 Strob., 244. *An.*

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*453] *J. F. ENTZ, Survivor, *vs.* MILLS & BEACH.

An auctioneer's clerk is not such an agent, within the statute of frauds, whose entry will bind the party; unless the authority of the clerk (to make the entry) has been specially obtained from the party who is to be bound by his act, or he has afterwards assented to be charged by it.

Before EARLE, J., at Charleston, May Term, 1839.

This was an action of assumpsit to recover the price of sundry articles sold by Entz & Williams, of whom the plaintiff is survivor, at auction, on the 13th July, 1838, and charged to the defendants.

It was an extensive sale made by Trenholm, Smith & McCormick. The entries in their sales book were made by their clerk, who was offered as a witness to prove them. The sale was conducted in the following manner: McCormick was the auctioneer. When an article was knocked down, the name of the purchaser was repeated aloud, with the article and the price, to the clerk, who was within ten or twelve feet, and he made the entry in the book. One of the defendants was present, and did purchase. The clerk supposed he must have heard their names repeated as

the purchasers of the particular articles set down to them at these prices; but the clerk received no directions from him to make the entries, nor did either of the auctioneers actually see the entries made. McCormick examined the books the next day, and found them correct. The defendant who made the purchases, when the bill was rendered made no objection to the prices, but refused to take the articles, except nine casks of wine, and thirty-seven casks of oil, which they accepted and offered to pay for. Each purchase made a separate entry. Those accepted were lots 21 and 69.

The entries in the sales book were rejected as evidence, and the plaintiff had a verdict for the price of the wine and oil.

The plaintiff moves for a new trial, on the ground of error, in excluding the books.

GROUNDS OF APPEAL.

1 That in the case of a sale at auction, where the purchasers knew at the time of the sale, that they were named publicly by the auctioneer, as the bidder; and also the articles they had bought, and the prices paid for them; and the auctioneer, at the time and place of sale, announced to his clerk the names of such persons as purchasers, and the articles purchased, and the prices—who at the same time and place made an entry of the same in the sales book of the auctioneer—that this was a sufficient memorandum to take the sale out of the statute of frauds.

2. That where a purchaser is present at a sale by auction, and hears his name announced as a buyer, with the articles bought, and the prices for the *same, and is subsequently furnished with a bill of parcels of the articles sold, and makes no objection to the bill of parcels, this is a sufficient [*454 recognition of the correctness of the original memorandum made by the clerk of the auctioneer, and of which the bill of parcels was a copy, to authorize such original memorandum to be used in evidence, and to take the sale from the operation of the statute.

3. That when a person is present at a sale by auction, and is announced by the auctioneer as a purchaser; and also, at the same time, the articles sold, and the prices, are announced, and an entry or memorandum to that effect, and including these particulars, is made by the clerk of the auctioneer, and the person announced as the purchaser does not dissent from the assertion made that he was the purchaser of such articles for such prices, that this is a sufficient authority for the clerk to make a memorandum of such a sale, so as to charge such person as a purchaser, and to take the sale from the operation of the statute of frauds.

4. That where a purchaser is furnished with a bill of the articles sold, and the prices at which the same were sold, and takes one of several parcels which had been sold, and all of which are enumerated in the bill furnished, and does not deny the sale, nor the prices affixed to the articles, but only objects to the *quality* of the articles sold—this is a sufficient recognition of a previous contract, to authorize the introduction in evidence of the original memorandum made by the clerk of the auctioneer, and of which the bill furnished was a copy.

5. That where an auctioneer publicly announces an individual as a purchaser, and such person is present, and does not dissent, nor deny the assertion made of his being the purchaser; and at the same time the auctioneer names the articles sold, and the prices, and none of these are denied; and, subsequently, a bill of parcels is rendered to such person, to which he does not object, and accepts one of the several parcels charged to him in the said bill; this is a sufficient confirmation of a memorandum made at the time and place of sale by the clerk of the auctioneer, of the name of the purchaser, the articles sold, and the prices, and of which the bill of parcels was a copy—so as to authorize

the introduction in evidence of such memorandum, as sufficient to charge him as a purchaser, and to take the case from the statute of frauds.

Appeal determined at Charleston, February, 1840.

Curia, per EARLE, J. The fundamental principle which pervades the whole law of agency, is, that an agent cannot delegate his authority; he cannot appoint a sub-agent; he cannot substitute another in his place. Where the Courts in England and in this country held an auctioneer, who made a sale, to be the agent of both the vendor and purchaser, it was per-
455] haps a departure from the letter of the statute, but justified by the necessities of business. To hold an entry by the clerk of an auctioneer to be a compliance with the statute, would be virtually a repeal. If it had not been seriously argued, I should have considered the point too plain to be disputed. We understand the practice is general in Charleston, for the clerks to make the entries. How such a mistake has arisen, it would be needless to conjecture. It has been ruled otherwise, both here and in England. In *Meadows* vs. *Meadows*, the very point was made and decided, that an entry by the clerk of the auctioneer was not a compliance with the statute, (3 McCord, 458,) and the case of *Coles* vs. *Trecothick*, (9 Ves, 251,) there referred to, decides the same point, that whatever may be the usage of trade, an auctioneer's clerk is not an agent within the statute, whose signature will bind the party, unless the authority of the latter has been specially obtained, or he has assented to it afterwards. The authority of Lord Eldon is always of the highest consideration, and having been relied on to sustain the case cited from McCord, it would be of no avail to cite other cases. In *Meadows* vs. *Meadows*, the sale was made in North Carolina, but their statute is the same.

And is it not obvious, upon the reason of the thing, that the clerk is not the authorized agent of the buyer? The sale is made by the auctioneer. He is the mutual agent of the parties, and the very ground on which his entry is held to bind the purchaser, is, that it is made upon the spot, at the time, and under the confidence inspired by his official character. Such an entry is supposed to be made in the presence of the parties: for it is only upon that ground that he can be considered the agent of the purchaser. When the clerk is twenty yards, or twenty feet, distant at the time the article is knocked down, and makes the entry from the mouth of the auctioneer, what security has the auctioneer that the entry is according to the fact? It would be as reasonable to hold that an entry made the next day, or a week after, would be binding.

It was argued, and the suggestion was countenanced by one of the Court, that the vendue Act has made a change on that subject. I think clearly otherwise. That Act seems to have been framed in conformity with the decisions of the Courts on the statute of frauds. Conceding that the auctioneer is the agent, and may bind the purchaser, it has provided that he shall keep books, in which shall be entered all sales, whether public or private. It would seem to follow, as an obvious conclusion, that the entries which are required to be made, and which, when proved, according to *Carter* vs. *Bennett*, (Ril. Ca. 287,)(*a*) are enough to enable

(*a*) 3 Hill, 254. *An.*

the auctioneer to recover either the price of the article sold, or the difference between a first and second sale, must be made by the auctioneer himself. He is the person licensed, who gives bond, and takes an oath; and the legal effect of his entry to bind the parties arises from his official character, and the *confidence reposed in him by both. A clerk [*456 known to neither is entitled to no such confidence, and his entry, not made in the presence of the purchaser, and with his assent, is not a compliance with the statute, and does not bind.

The motion to set aside the verdict is refused.

GANTT, BUTLER and RICHARDSON, JJ., concurred.

Magrath, for the motion. *Frost*, contra.

See *Cathcart* vs. *Kernaghan*, 5 Strob., 130; *Wolfe* vs. *Sharpe*, 10 Rich., 63; *Christie* vs. *Simpson*, 1 Rich., 410; 3 McC., 458. *An.*

THE STATE *vs.* ARTHUR AND GUIGNARD.

Where two Justices, under the habeas corpus Act, had admitted a person to bail, who was charged with murder in the warrant, it was held that they were guilty of an escape, and might very properly be indicted.

Before RICHARDSON, J., Richland, Fall Term, 1838.

The defendants were justices of the quorum, and admitted to bail John Whitecotton, committed upon a charge of murder, and who was brought before them upon a *habeas corpus*.

Upon motion of the solicitor, they were ordered to show cause why they should not be indicted for a misdemeanor, in admitting Whitecotton to bail. They showed cause, as follows:

"That the said Whitecotton was brought before them, together with the warrant of commitment, the coroner's inquest, and the affidavits annexed, by which it appeared that Abner Striplin was the slayer; that the deceased died of the blows received at his hand, and no fact appeared to establish any concert between Whitecotton and Striplin in relation to the act. The respondents believed that, independent of the *habeas corpus* Act, they had a right to bail. Two justices had such power by the common law, and neither the statute of Westminster 1st, nor the statute of 2d Phil. & Mary, has, in terms, taken it away. If these statutes have been so construed, it has not come to their knowledge.

ED. J. ARTHUR,
JAMES S. GUIGNARD."

*The Court ordered an indictment to be given out, from which order [*457 the defendants appealed, upon the grounds:

1st. That they had power by law to bail the prisoner.

2d. That the case was one in which it was proper to grant bail.

Appeal determined at Columbia, Fall Term, 1838.

Curia, per EARLE, J. I very much doubt the propriety of deciding important legal questions in this incidental way upon a rule to show cause; and also, whether the order of the Circuit Judge was the proper

subject of appeal. He directed an indictment to be preferred against the defendants, and as they could not be affected by proceeding, until they were put on their trial, it seems to me that the proper time and mode of making the question on their power to admit to bail, would have been on the trial, and by plea. As the question, however, has been argued here on the appeal, it is thought best to express the opinion of the Court on the subject.

It would seem to be sufficient for the purpose, to refer to the case of the *State* vs. *Everett & Potter*, (Dudley, 295,) and to examine the commitment. The charge is "that the said John Whitecotton did wilfully and feloniously kill and murder the said Hiram Addison." Here is a felony plainly expressed in the warrant of commitment; and is the very exception made by the habeas corpus Act, which excludes a party from the benefit of its provisions. The subject of bail is regulated by English statutes, made of force. The leading statute is Westminster the 1st, c. 15, in the construction whereof it hath been held, that those imprisoned for the death of a man were declared to have been always irreplevisable; (2 Hawk. P. C. 147,) and there is no statute giving to one or two Justices the power to admit to bail persons declared not to be bailable by the statute.

After an examination of all the statutes, Mr. Sergeant Hawkins says, "that Justices of the Peace have no power to bail any person not replevisable by the above mentioned statute of West. 1, c. 15." And although the Act of Assembly of 1712, (2 Stat. large, 399,) gives power to any two Justices, one to be of the quorum, to execute and put in force the habeas corpus Act, yet, by the provisions of the latter, a person charged with murder, "a felony, plainly and specially expressed in the warrant of commitment," is not to be admitted to bail. He is in confinement by a warrant, in the language of the Act, "for a matter of offence, for the which, by the law the prisoner is not bailable." If, therefore, the Justices had no express authority by any other Statute or Act, and if the prisoner's case is excepted out of the provisions of the habeas corpus Act, they were guilty of an escape, in admitting him to bail, and were properly ordered to be indicted.

The Judges of the Court of Common Pleas and Sessions, having all the power of the Court of King's Bench, may bail in all cases of offence whatever, *according to circumstances; and this either in term time, or at chambers. They will look into the depositions, and examinations, and into the inquest; and take other evidence, if need be. But this is by virtue of their original and inherent superintending power, and not derived from the habeas corpus Act. Any number of inferior magistrates united, have no such power, and it would be of dangerous tendency to confer it upon them.

*458]

While at the bar, I prosecuted an indictment, against two Justices, for admitting to bail one charged with the murder of a slave, and they were convicted and fined.(*a*)

Motion dismissed

GANTT, RICHARDSON, BUTLER and EVANS, JJ., concurred.

De Saussure for the motion; *J. D. Edwards*, Solicitor, contra.

(*a*) Vide Acts 1839, page 15.

See 11 Rich. 63; Dud. 295. *Rn.*

The State *vs.* Erasmus Gunter.

A question of credit between two witnesses, is to be left to the jury, and their finding will not be disturbed, notwithstanding it may be contrary to the views of the presiding judge, expressed in his charge.

Before Earle, J., Richland, Spring Term, 1836.

This was an indictment for buying corn from a negro man slave, named Bob, belonging to the estate of David Myers.

James Gray, the only witness produced on the part of the prosecution, proved the offence, substantially as laid in the indictment. He was living with the defendant as a hireling. Slept in the house, which contained only two rooms. The defendant occupied the inner or small room. Bob knocked at the window of the small room where defendant slept. Learning who was there, defendant directed Gray, who slept in the outer room, to open the door. Defendant went out. Bob brought about four bushels of corn, which they (defendant and Bob,) carried to the barn, and on their return defendant paid him for the corn, in meat, tobacco, and whiskey. It occurred an hour or two after dark. Afterwards, Bob brought about two bushels *of corn, a little before day, and the defendant bought it, and [*459 paid for it in the same way. The negro made himself known as before, by knocking at the window, and the defendant went out to the door and received the corn, paying for it after they returned from the barn; a night or two only after the former time.

The witness admitted that he had quarelled with defendant, who refused to pay him his wages, and on that account he had got mad, and parted with him. On the part of the defendant, Elizabeth Gray, (sister of the former witness,) deposed, that she lived with defendant all the time James did. She occupied the inner room, where defendant slept, and she deposed that no such dealing or transaction ever took place within her knowledge; and if it did occur at all, it would seem she must have known it.

Other witnesses were called to the character of Gray, both to discredit him and sustain him. Several deposed that they would not believe him, while others knew no cause why they should not; and would believe him. Dr. Briggs, who seems to have known him best, gave him such a character as should have overthrown his testimony altogether, according to the opinion of the presiding Judge, but the jury thought otherwise, and found the defendant guilty.

It was a question of credit between two witnesses; on the one hand, one of whom had quarrelled with the defendant, and the other was his paramour; on the other, between a witness whose character was proved to be bad, and a defendant whose character was not proved to be good.

Appeal determined at Columbia, Fall Term, 1836.

Curia, per Evans, J. This was one of that class of cases which a jury are more competent to decide than this Court. The evidence was contradictory, and the question was, whom the jury should believe. They have decided, and I do not perceive any such palpable error, as should induce this Court to interfere. The motion is refused.

Butler, Earle and Richardson, JJ., concurred.

De Saussure for the motion. *Elmore*, Solicitor, contra.

See Infra, 494.

*460] *J. A. M DEVALL *vs.* IVY TAYLOR.

If the proceedings of a justice, from whom a writ of Domestic Attachment issued, shows upon its face, that the justice had no authority to grant the attachment, or if it fail to show that he had, then no judgment could be given upon it, either by himself or the circuit court, but the whole in an absolute nullity; and it is of no consequence in what way the defect is brought to the view of the Court, or at whose motion it is quashed.

Before EARLE, J., at Abbeville, Fall Term, 1839.

This was a writ of domestic attachment, levied and returned. On motion being made for a decree, the attention of the Court was called to the affidavit of the plaintiff, for the purpose of obtaining the attachment, which stated the indebtedness, and that the defendant was about to remove out of the State personally, or so absconded and concealed himself that process could not be served on him. And it was moved, by Mr. Burt, to set aside the attachment, for insufficiency in the affidavit to give the justice jurisdiction. The order was made accordingly to quash the attachment, which the plaintiff now moves to set aside, and for a decree.

GROUNDS OF APPEAL.

1. Because the defendant in attachment cannot appear by attorney, until the attachment has been dissolved. And no one except the defendant, can take advantage of irregularities in the attachment.

2. Because the Court will not, upon motion, set aside an attachment for irregularity.

Appeal determined at Columbia, Fall Term, 1839.

Curia, per EARLE, J. The attachment Acts authorize justices of the peace to grant writs of attachment, in certain cases, on the oath of the plaintiff, returnable, either to the next court for the district or before themselves, according to the amount sued for. The cases provided for, in which justices have this extraordinary jurisdiction, are—1. Where the debtor is removing out of the district privately; 2. Where he absconds and conceals himself, so that the ordinary process of law cannot be served upon him; 3. Where he intends to remove his effects. Although it has been held, in *McKenzie* vs. *Buchan*, (1 N. & McC., 205,) that the oath of the plaintiff, establishing the particular state of facts which gives jurisdiction to the justice, need not be in writing, yet it is clear, both on general principle and on authority, that it should be recited in the writ. This is universally true, of all courts of inferior and limited jurisdiction, that their proceedings must show, upon their face, that the subject matter is within their jurisdiction, else they will be regarded as nullities. And *461] very many cases *will be found in the English courts, and in our own, of their being quashed on motion. The general rule, as stated by the Court in *Winford* vs. *Powell*, (2 Lord Raymond, 1310,) in regard to inferior courts, is, that nothing shall be intended to be within the jurisdiction, that is not expressly averred so to be; though, in the case of a superior jurisdiction, nothing shall be intended out of it. (6 Mod., 223; 5 Mod., 322; Str., 8; 6 Term., 583.)

Wherever a special authority is given to justices, it ought to appear that the authority has been exactly pursued. And, said Lord Chancellor

Pratt, in a case before him, "I do not see to what purpose we exercise a superior intendency over all inferior jurisdictions, unless it be to inspect their proceedings, and see whether they are regular or not. I have often heard it said, that nothing shall be presumed, one way or the other, in an inferior jurisdiction." If the proceeding show, upon its face, that the justice had no authority to grant the attachment, or if it fail to show that he had, then no judgment could be given upon it, either by himself or the Circuit Court; but the whole is an absolute nullity; and it is of no consequence in what way the defect is brought to the view of the Court, or at whose motion it is quashed. The case of *Hagood* vs. *Hunter*, (1 McC. 511,) is exactly this case, and perhaps it would be enough to refer to it. There the affidavit was, that the defendant "was about to remove from and without the limits, or so abscond and conceal himself." Here the oath is, that "he is about to remove out of the state, personally, or so abscond and conceal himself." To authorize the attachment, there should be a precise allegation of some one of the three categories which give jurisdiction. To be about to remove out of the State, personally, is very different from being in the act of removing privately out of the district, and would not authorize the justice to grant the attachment. There is as much reason to suppose the writ issued on that part of the oath as on the other. Indeed, I would consider an affidavit, or the recital of one, in the disjunctive, as bad, although either of the facts deposed to might be sufficient. This is very unlike the cases of *Havis* vs. *Trapp* and *Gresham* vs. *Deale*. (2 N. & McC. 130.) There the motion was to allow the defendant to introduce affidavits of himself and others, to contradict on the oath of the plaintiff, and to quash the indictment because it was not true. This was refused, because it would make up a collateral issue, upon a point on which the Act had provided that the oath of the plaintiff should alone be sufficient. And the Court properly refused to go into evidence *aliunde*, when the attachment was regular and valid on its face.

The attachment here was properly quashed in the Circuit Court; and the motion is refused.

RICHARDSON, GANTT, O'NEALL, EVANS and BUTLER, JJ., concurred.

Wardlaw and *Perrin*, for motion. *Burt* and *Thompson*, contra.

See Supra. 264; note 266. *Am.*

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*GEORGE EASTERBY *vs* JAMES HEILBRON, [462
THE SAME *vs.* THE SAME.

In the construction of covenants, the intention of the parties must govern, where the intention can be ascertained from the instrument itself. Parol proof is not admissible to explain a deed of covenant, where there is no ambiguity.

Before EARLE, J., at Charleston, ————.

These were actions of *replevin*, in which the parties, pleadings, and evidence were the same. The defendant avowed for rent in arrear. Pleas, *non tenuit*, and no rent in arrear; to which, in the second action, was added the further plea of no rent in arrear, *nisi* a certain sum, which was tendered.

The premises demised consisted of the lot at the northeast corner of Church and Queen streets, "together with the three brick tenement dwelling houses thereon; and also the brick buildings now in the progress

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COPY OF THE LEASE.

South Carolina:—

Memorandum of an agreement, made and concluded upon, by and between Dr. James Heilbron, of Charleston, of the one part, and Captain George Easterby, of the same place, of the other part.

The said James Heilbron, for and in consideration of the sum, or yearly rent, hereinafter mentioned, has agreed to let, lease, demise, and to farm let, and by these presents, doth let, lease, demise, and to farm let, unto the said George Easterby, all that certain messuage, piece, and parcel of land, situate, lying and being in the City of Charleston, at the North East corner of Church and Queen streets, measuring and containing on Church street one hundred and sixteen feet, and on Queen street sixty-six feet, together with the three brick tenement dwelling houses, and other buildings thereon, and also the brick buildings now in the progress of erecting thereon, and all the buildings, hereditaments, and appurtenances, to the aforesaid premises belonging, for the term of five years, commencing on the 10th day of July, in the year of our Lord one thousand eight hundred and thirty-six, and ending on the tenth day of July, in the year of our Lord one thousand eight hundred and forty-one: subject, nevertheless, to the covenants and considerations hereinafter stipulated.

The said George, Easterby, in consideration of the above letten premises, doth covenant, promise and agree, to pay unto the said James Heilbron, his lawful attorney, executors, administrators, or assigns, for the use and occupation or rent of the said messuage, piece, or parcel of land, with the buildings already erected thereon, at the rate of three hundred dollars per annum, payable quarterly, until the brick buildings on Church street, appurtenant thereto, now in the progress of being erected thereon, are completed and finished; and as soon as the said brick buildings on Church street, appurtenant thereto, are completed and finished, the said George Easterby, for himself, his executors and administrators, doth covenant, promise and agree, to pay unto the said James Heilbron, his certain attorney, executors, administrators or assigns, for the use and occupation or rent of the whole of the said premises, the yearly rent or sum of one thousand three hundred dollars per annum, from the time of such completion, delivery or tender, during the residue of the continuance of this lease, payable quarterly; and doth also covenant, promise and agree, well and truly to keep the said premises, and use them, as the intention of this agreement directs, and at the end of the said term, on the tenth July, in the year of our Lord one thousand eight hundred and forty-one, to surrender and deliver up the same, to the said James Heilbron, his agent, executors, administrators or assigns.

And it is further mutually covenanted and agreed upon, by and between the parties to these presents, that the said James Heilbron, his executors or administrators, is to erect and finish, at his own expense, the brick buildings on Church street, appurtenant thereto, as soon as the said James Heilbron can get the same finished and completed, by the workmen, under the contracts now existing for the completion thereof; the said buildings to be erected and finished by the said James Heilbron, according to his own plan and directions, and in such manner and form of external and internal arrangements, finish, decoration, convenience, and accommodation, as he pleases, and deems expedient, without the control, interference or control of the said George Easterby, in any manner whatsoever, and without, in any manner whatsoever, releasing the said George Easterby, his executors or administrators, from the obligation of this lease: And whenever the said James Heilbron, his executors or administrators, declares the said buildings completed and finished, of which he is to be the sole and exclusive judge, and tenders the use and occupation thereof to the said George Easterby, the said George Easterby, his executors or assigns, shall be bound to receive and accept the same, without objection, refusal or pretence, of any kind whatsoever; and the said George

of being erected thereon; and all the buildings, hereditaments, and appurtenances, to the aforesaid premises belonging." The term was for five years, commencing the 10th July, 1836. The plaintiff, among other things, covenanted to pay rent for the lot, "with the buildings already erected thereon, at the rate of three hundred dollars per annum, payable *quarterly, until the brick buildings on Church street, appurtenant thereto, now in the progress of being erected thereon, are completed [*463 and finished; and as soon as the said brick buildings on Church street

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Easterby, his executors or administrators, shall from the time of such tender, become liable and bound to pay to the said James Heilbron, his attorney, executors, administrators or assigns, the annual rent or sum of one thousand three hundred dollars per annum, payable quarterly, until the said tenth July, in the year of our Lord one thousand eight hundred and forty-one.

And it is further mutually covenanted and agreed upon, by and between the parties to these presents, that the said James Heilbron is to allow to the said George Easterby a deduction of three hundred dollars, from the first years's rent of the premises, commencing from the date of the lease; the whole sum of three hundred dollars is hereby stipulated and agreed to be expended by the said George Easterby, in such repairs and improvements as he deems proper, on the dwelling houses and outbuilding already erected; and the said George Easterby to claim no other deduction or expense of repair, on any part of the whole premises, during the continuance of the lease. If the said George Easterby wishes or requires any other ordinary repairs, or improvements, to any part of the hereby demised premises, during the lease, the same are to be put and made at his sole expense, without recourse to the said James Heilbron, his executors, administrators or assigns; but if extraordinary repairs, arising from devastation, by storm, or partial injury from fire, become necessary, during the continuance of this lease, such extraordinary repairs shall be made by and at the expense of the said James Heilbron, his executors, administrators or assigns. All taxes and assessments, to be paid by James Heilbron.

And it is further mutually covenanted and agreed upon, by and between the parties to these presents, that the said George Easterby, his executors or administrators, shall and will keep the aforesaid premises, dwelling-houses, and outbuildings, in good repair, and tenantable order, (extraordinary damage, from storm or fire, as aforesaid, excepted,) at his own proper expense, and at the expiration of this lease, restore the same to the said James Heilbron, his executors, administrators, or assigns, in like order as he receives them: And the said George Easterby, for himself, his executors, and administrators, doth covenant and agree, not to assign this lease, or any unexpired term of it, without the consent and approbation of the said James Heilbron, his executors, administrators, or assigns.

And it is further mutually covenanted and agreed upon, by and between the parties to these presents, that if the dwelling houses upon the messuage or parcel of land contained in this lease, be destroyed by fire, at any time during the said term of five years, that this lease shall immediately cease and determine, and be null and void, for the residue of the said term of five years; and the said James Heilbron, his executors, administrators and assigns, shall be at full liberty to re-enter upon the said premises, and repossess himself thereof, without the hinderance, molestation, or disturbance of the said George Easterby, his executors or administrators; without prejudice, nevertheless, to the legal right of the said James Heilbron, his executors, administrators or assigns, to enforce the payment of such rent as may be due by the said George Easterby, his executors or administrators, up to the period of such destruction by fire.

Witness our hands and seals, this sixteenth day of June, in the year of our Lord one thousand eight hundred and thirty-six, and in the sixtieth year of the sovereignty and independence of the United States of America.

JAMES HEILBRON, [L. S.]
GEORGE EASTERBY, [L. S.]

Sealed and delivered } H. A. De Saussure,
in the presence of } S. Heydenfeldt.

appurtenant thereto, are completed and finished," the said G. E. (the plaintiff) covenanted to pay the defendant, as rent for the whole of the said premises, the yearly sum of thirteen hundred dollars, "from the time of such completion, delivery or tender, during the residue of the continuance of the lease, payable quarterly." Another covenant of the lease was in these words: "And it is further mutually covenanted and agreed upon, by and between the parties to these presents, that the said James Heilbron is to erect and finish, at his own expense, the brick buildings on Church street, appurtenant thereto, as soon as the said J. H. can get the same finished and completed, by the workmen, under the contracts, now existing, for the completion thereof; the said buildings to be erected and finished by the said J. H. according to his own plan and directions, and in such manner and form of external and internal arrangements, finish, decoration, convenience and accommodation, as he pleases and deems expedient, without the interference or control of the said George Easterby, in any manner whatsoever, and without in any manner whatsoever releasing the said G. E. from the obligation of this lease: *And whenever the said J. H. declares the said* buildings completed and
*464] finished, *of which he is to be the sole and exclusive judge, and tenders the use and occupation thereof to the said G. E., he, the said G. E. shall be bound to receive and accept the same, without objection, refusal, or pretence, of any kind whatsoever; and the said G. E. shall, from the time of such tender, become liable and bound to pay the said J. H. the annual rent or sum of one thousand three hundred dollars, payable quarterly," until the end of the term. The lease is dated the 16th day of June, 1836.

On the 10th April, 1837, the avowant gave to the plaintiff notice in writing, declaring the new buildings to be finished, and tendering them to him. The plaintiff, without replying in writing to the notice, subsequently occupied the premises. Afterwards the avowant distrained for the advanced rent, and the plaintiff replevied.

When the avowant had closed his case, the plaintiff proposed to go into evidence, to prove that, at the time of the notice and tender by the avowant, the new buildings were not finished and completed; and that

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[Copy of defendant's letter, referred to in the Report of his Honor, the presiding Judge.]

Charleston, April 10, 1837.

To GEORGE EASTERBY, ESQ.:

DEAR SIR:—By the terms and covenants specified in my lease to you, dated 16th June, 1836, of the house and lot at the corner of Church and Queen streets, I agreed to finish the buildings, then in the progress of erection, as soon as I could get them completed; and whenever I declared the buildings completed and finished, of which, by the lease, I was to be the sole and exclusive judge, I was to tender the use and occupation thereof to you, and you were bound to accept and receive the same, without objection; and from the time of such tender, you became liable and bound to pay me the annual rent of fifteen hundred dollars for the premises.

The object of this letter is to give you notice that I now declare the said buildings completed and finished, and tender them for your use and occupation; and from this date I shall expect you to pay me the rent of fifteen hundred dollars, by quarterly payments, for the premises.

You will oblige me by an early answer to this letter.

Respectfully,
JAMES HEILBRON.

some of the apartments were not in a condition to be occupied. I considered and held, that the plaintiff was estopped by his own deed and that he was also concluded by the fact of entering and taking possession under it, from averring that the buildings were unfinished.

The plaintiff also objected, that in the notice of the 10th April, the avowant misstated the amount of the subsequent annual rent to be paid, *and set it down at fifteen hundred dollars, instead of thirteen hundred dollars. I thought the error immaterial, and overruled [*465 the objection.

At the commencement of the term, viz., 10th July, 1836, the workmen in the employment of the plaintiff occupied a portion of the demised premises, for which the original rent was stipulated to be paid, as a workshop, and continued to do so for a considerable time afterwards. Under a notice of discount, the plaintiff claimed rent for the use and occupation of the rooms thus occupied. I explained to the jury the circumstances from which the law would imply a contract to pay rent, in the absence of any express agreement, of which there was no proof; and submitted to them, whether the case made furnished evidence to sustain an implied contract, or whether the circumstances afforded grounds to believe that there was an understanding, that the workmen were to be allowed to remain in the occupation of the room free of rent.

The jury found for the avowant the rent in arrear, with some deductions in favor of the plaintiff, under his notice of discount, refusing any allowance for the use and occupation of the store room.

The plaintiff appeals from the verdicts, on the following grounds:

1. That by the true legal, as well as just and equitable, construction of the covenants contained in the lease, the obligation of the plaintiff, to pay *the increased rent, was not to attach until the new buildings were actually [*466 finished and completed; and that the privilege reserved to the avowant, to determine when the buildings were complete, did not confer upon him an arbitrary right to demand the increased rent, upon his declaring the buildings to be complete, contrary to the fact; but that the exercise of this privilege may be controlled and restricted, by proof that the buildings were not in a condition to be honestly tendered. Wherefore, it is submitted, that his Honor should not have excluded evidence offered to show that in point of fact, the buildings were not finished and completed, nor even habitable, at the time they were tendered by the avowant.

2. That his Honor should not have ruled, that the tender made by the avowant was sufficient to render the plaintiff liable for the increased rent, inasmuch as the avowant in making such tender, demanded a higher rent than that stipulated in the lease; and it is respectfully submitted, that, by accompanying his tender with a demand for such higher rent, the avowant forfeited all benefit he might otherwise have been entitled to claim by his tender.

3. That his Honor should not have ruled, that whether the tender proved was a sufficient tender of the premises demised by the lease in evidence, was a question exclusively for the Court, and not for the jury.

4. That his Honor should not have charged, that the plaintiff, if the buildings were not finished and completed, when tendered to him, was bound to have refused to accept them, on that ground, and that his not doing so, was an acquiescence in the sufficiency and propriety of the tender, inasmuch as there was no evidence of his having accepted the buildings, when tendered: and his Honor had moreover previously ruled, that under the lease, the plaintiff was bound by the mere tender; and, therefore, excluded, generally, all evidence

going to show that he ought not to be bound by the tender, as inadmissible in the present actions: whereby the plaintiff was precluded from showing, as he could have done, by the most abundant proof, not only, that the buildings were unfinished and uninhabitable, but that he had actually refused to accept them, on that very ground, at the time of the tender.

5. That his Honor should not have charged, that if the jury were satisfied
*467] that it was the intention of the parties, that the avowant should *occupy a part of the demised premises, as store rooms, &c., during the progress of the new buildings, without rent, they might refuse to allow the plaintiff rent for the use and occupation of such part of the premises, by the avowant; inasmuch as there was no such reservation, nor any expression, or intimation, of such an intention in the lease, nor, indeed, any parol evidence of such an agreement or understanding on the part of the plaintiff.

6. That under the evidence, the plaintiff was entitled to rent for the use and occupation by the avowant, of part of the demised premises, the possession of which was withheld by the avowant, for a period of eleven months, subsequent to the commencement of the lease; and that the verdict was erroneous, in not discounting such rent from the amount of the rent claimed by the avowant, for the entire premises.

7. That the verdict is, in other respects, contrary to law and the evidence.

Appeal determined at Charleston, February, 1840.

Curia, per EARLE, J. The general rule for the construction of covenants is well enough understood; the intention of the parties, when it can be ascertained from the instrument, must govern; and to come at this, all the parts of it must be considered together. On a fair construction of the deed in question, we cannot doubt, that the object of the parties was to avoid the very dispute which has arisen. It would seem almost impossible for language to be more explicit; and either the covenant upon which the question arises, means what was supposed in the Court below, or it must be struck out as meaning nothing. It may have been folly in the tenant, to bind himself to accept the tenements and to pay the increased rent, whenever the landlord gave him notice; but that he has bound himself to that extent, cannot be doubted by any one who will read the instrument. To allow the tenant under such a covenant to offer proof that the houses were unfinished, would be to repeal the agreement altogether;(*a*) and that we have no right to do. If the houses were unfinished, and he sustained any damage from that cause, he has his right of action on the covenant of the landlord to finish; and this he may have brought at the same time his goods were distrained. If men will enter into covenants which involve them in trouble, the Court cannot relieve them; they must abide the consequences.

It is palpable that the covenants are independent, and each must resort to his own remedy. There is no ambiguity, and they cannot be explained away.

On the other point raised, the Court does not perceive any error in the instructions to the jury. If the judge is allowed to say any thing at all, he must be permitted to give his advice, to suggest such considerations
*468] as *will enable the jury to come to a correct conclusion. If the judge were to be muzzled, and not permitted to say any thing on the facts, the complaints against juries would be louder and more frequent than they are.(*b*) Here, such circumstances were suggested to

(*a*) Sup. 134. *An.*

(*b*) See 2 McM. 425; 1 Mills' C. R. 227; 8 Rich. 140. *An.*

the jury, as might induce them to come to a particular conclusion. It was for them to decide, and they were not precluded from acceding.

The motion to set aside the verdict is refused.

GANTT, RICHARDSON, O'NEALL and BUTLER, JJ., concurred.

Bailey and *Brewster*, for the motion. *H. A. De Saussure*, contra.

JAMES EAGAN *vs.* ISRAEL GANTT, SEN'R.

On the trial of an action for slander, the defendant will not be permitted, under the plea of the general issue, to prove the truth of the words spoken, or any fact which will go to criminate the plaintiff. The plea of justification, in order to prove the truth of the slander, must always be pleaded.

Before RICHARDSON, J., at Lexington, September Term, 1835.

This was an action of slander, for charging the plaintiff with perjury, by swearing to a lie, in the course of evidence given by him, in a case of trespass, brought by *Steedman* vs. *Gantt*. The evidence fully supported the case, with the necessary *colloquium*, &c. The plea was the general issue "*not guilty;*" and the defendant introduced one Wm. Williams, who was permitted by the Court (though objected to by Eagan's counsel,) to prove the matter that Eagan had sworn to, upon the former trial, and charged to be false by the defendant, Gantt. Williams related "that Eagan said that the land," (then in question,) "was pretty nigh wore out, and that Gantt had cultivated the land seven or eight years." Gantt's counsel then offered to ask the following questions, which were objected to:

"Was the land pretty nigh worn out? Did Gantt cultivate the land seven or eight years? Was the evidence of Eagan true, or not?"

The questions were overruled, as wholly incompetent, without the plea of justification. But all questions and matter short of direct evidence of Eagan's perjury, when formerly sworn, were allowed. Defendant's counsel contended, that since the case of *Reed*, &c., there was no necessity for the *plea of justification in any case. The case was given out to [*469
the jury upon the facts, and they returned a verdict of three hundred dollars for plaintiff.

The defendant appeals, on the grounds:

1st. Because the defendant offered to prove by several witnesses, that Eagan swore on the trial of *I. & A. Steedman* vs. *Israel Gantt*, in an action of trespass to try titles, and to recover damages, that Gantt had occupied and cultivated the land for eight years, and that the land was nearly worn out, and Eagan's testimony on these points was not true. The words alleged in the declaration, were spoken in allusion to Eagan's testimony in this case, but the Judge decided that it was incompetent evidence, to contradict what Eagan swore in that case, unless the defendant had pleaded justification.

2d. Because it was competent, under the plea of the general issue, to give circumstances in evidence, (to rebut the idea of malice on the part of the defendant,) that Eagan's testimony was inconsistent with the facts; and that the circumstances proposed to be proved, (and which were excluded by the Court,) would have gone to establish what was not true, and that his evidence

was erroneous; and the circumstances ought to have been permitted to have gone to the jury in mitigation of damages.

3d. Because all the circumstances of Eagan's testimony, and the facts connected with the case, were competent, on the part of the defendant, to prove the provocation—the probability of the charge, and the suspicion the plaintiff's evidence was calculated to create.

4th. Because the verdict was, in other respects, contrary to law and evidence.

Curia, per RICHARDSON, J. I am directed to announce the decision of the Appeal Court. The Court have to inquire, whether the questions, put by the defendant's counsel, and overruled by the presiding judge, were offered for the purpose of proving that Eagan had sworn falsely, or for the purpose of extenuating the slander, and thereby diminishing the offence of Gantt, without criminating Eagan. The former would require the plea of justification, in form; the latter, no more than the general issue—"not guilty."

In practice, it is often difficult to distinguish between matter of justification, and circumstances which go to extenuate the slander and lessen the damages, yet leave the plaintiff uncriminated; but, the moment the distinction is seen, the rule of pleading is unquestionable.

In the case before us, it was not denied on the circuit, that the object was to justify the defendant. The drift of the questions offered is indeed plain, from the third question, *i. e.* "was the evidence of Eagan true or not?" This question was urged upon the Court, by the same argument *which was offered to justify the first and second questions. The proposition of the defendant's counsel, at the trial, was, that there is no legal necessity to plead a justification, in order to make it competent to prove the truth of the slander. It is true, that the argument is immaterial to the merits of the question. But it was this proposition that was rejected by the Court, as a mistake in law. And such questions as were predicated upon it, were overruled, as altogether incompetent, without the plea. But all questions searching for matter of excuse or extenuation, and short of evidence going to criminate Eagan, were allowed by the Court. The argument might rest here, but as the facts of the case illustrate the justice and necessity of preserving the plea of justification, for its proper office—to prevent surprise—I will notice them.

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The plaintiff first proved the slanderous charge of perjury, as made by the defendant, in reference to his former evidence, given in a certain case. The defendant then introduced William Williams, who swore that Eagan when examined at the trial, deposed that "the land was pretty nigh worn out; and that "Gantt had cultivated it seven or eight years." So far, the evidence was harmless; and although objected to was permitted, as the possible foundation of some explanation or extenuation, yet to come. Upon this evidence, the questions rejected were predicated. "Was the land pretty nigh worn out?" "Did Gantt cultivate the land seven or eight years?"(*a*) And lastly, as if to demonstrate that the crimination of Eagan was aimed at, the two former questions were reiterated in the third. "Was the testimony of Eagan true or not?" In this third question, we have the precise gist of the inquiry before the Court, *i. e.* Was the object to criminate Eagan? Now I ask, how was it possible for Eagan to be prepared to resist the evident crimination intended to be

(*a*) See 2 Sp. 1. *An.*

brought out by such questions, when placed in such a connection with the evidence just given by Williams? Unless the plaintiff had been put on his guard, by a plea that the charge of perjury would be justified? Without such a plea, he must have been surprised to find the tables thus turned upon him. And such surprise attests the necessity of requiring, that the plea should have been filed on the part of Gantt. The plea of justification is not abolished. Its place is found, whenever the intention is to criminate the plaintiff, by proving the slanderous words true.

The Court therefore concur with the presiding judge; and the motion is refused.

JOHNSTON, EVANS, JOHNSON, and GANTT, concurred.

BUTLER, J., dissenting. I dissent from the opinion of the Court in this case. The defendant did not wish to assume the perilous position of deliberately imputing perjury to the plaintiff by filing a plea of justification, which could alone be supported by proof of a perjury.—That is, that *plaintiff had taken an oath, in a judicial trial, to a fact material to the issue, and which was deliberately and wilfully false. [*471 When the defendant made the charge, he may not have been acquainted with all the legal ingredients of the crime imputed to the plaintiff, and at the trial, he may not have been able or willing to prove all that would be required by the plea of justification. But does it follow that he should have been deprived, for the want of such plea, of an opportunity of showing, that defendant had been culpably negligent in making his estimates before he was sworn on a former trial?

The defendant did not offer to prove that plaintiff had committed a perjury, he offered to show that plaintiff had said in his oath what was in fact not true; that is, the land in question was not near worn out, and that Gantt had not cultivated it seven or eight years; and in doing this it would not have followed that plaintiff had been guilty of a wilful falsehood. If defendant had been permitted to introduce his evidence, he might have shown that the land was somewhat used, but not nearly worn out, and that Gantt had cultivated it for four or five years, but not seven or eight; or he might have shown that plaintiff had sworn with a recklessness and ignorance of the true facts, which was culpable in a high degree, but not legally criminal; that he had spoken "unadvisedly with his lips," where it had been in his power to have informed himself, and to have given correct information on the matter in controversy. Should a party be deprived of showing these things, because he cannot make out a crime against the plaintiff to justify the words spoken? Cannot a party excuse himself by showing something by way of extenuation, without being driven to a plea which would impose on him the necessity of convicting plaintiff of a technical crime? If a defendant is deprived of this evidence, this is his situation; he cannot plead justification, because he has not evidence enough to support it, and if he does not justify, he is deprived of all evidence to excuse himself, by showing that plaintiff had committed a mistake, or had been guilty of great negligence in making statements giving information to the Court. The plaintiff in his evidence on a former trial might have testified to what was not true, without its being criminally false, so as to fix on him the imputation of perjury. The extent of the evidence offered by defendant and rejected by the Court,

was to show that plaintiff had not testified truly, as to the degree of wear and deterioration of the land, and the time it was occupied. In giving his evidence, the plaintiff may have made a mistake, or he may have been culpably negligent; and how could defendant show either without the evidence which was excluded? In what way could he have availed himself of the benefit of this evidence? If it could have been of any service to him, he has been precluded from it unjustly by the rule laid down. I have always understood the rule to be, that a defendant in slander could introduce any evidence under the general issue, to reduce the damages by showing that he had grounds for what he had *said of the plaintiff, *472] and that he could show any grounds not amounting to the crime imputed; but where he contends for an entire verdict, he must show that he did not use the offensive words; or if he intends to maintain the truth of them to the extent of their legal import, he must do so under a plea justification. I will suppose a case, that A. said of B. that B. was guilty of larceny; an action was brought; A. could show that B. had traded with a negro, under suspicious circumstances, showing that he had traded for stolen goods; the charge would not be supported by the proof under plea of justification; but should the defendant, on that account, be deprived of the testimony under the general issue to reduce the damages? Any thing less than the crime imputed should be given in evidence, under the general issue; but where evidence is offered to prove the crime charged, it should be a plea of justification, to authorize its admission.

O'Neall, Harper and De Saussure, concurred.

Caldwell and *Summer*, for the motion. *Bauskett* and *Caughman*, contra.

See 10 Rich. 417; 1 N. & McC. 268. *An.*

The State *vs.* Horatio Blease.

It is not necessary, in an indictment under the Act of 1754, (P. L. 335–6,) for aiding a slave in running away and departing from his master's employment, to set out and aver the means used in aiding the slave to run away. It is sufficient for all purposes if the indictment charge the offence in the words of the Act. It must definitely and directly charge the defendant with aiding the slave in running away, so that his master has been deprived of his services; the name of the slave, and the name of his master; the time and place, &c.

Before O'Neall, J., at Edgefield, Spring Term, 1837.

The prisoner was indicted under the 3d clause of the 1st section of the Act of 1754, (P. L. 335–6,)(*a*) for aiding a slave in running away and departing from his master's service. The indictment charged the offence in the words of the Act, but did not set out the means employed by the defendant in aiding the slave to run away. It was proved that a slave, the property of Francis Bettis, whose name was Jim, ran away from his

(*a*) 7 Stat. 426. *An.*

master's service, on the night of the 24th of December, 1836; on the 26th of *December, 1836, he was found in Schriven County, State of Georgia, and a paper was produced by him as a pass, and [*473 taken from his possession, of which the following is (I believe) a literal copy. "This is to show my boy Jesse a leaf to hire is own time for next year." signed, "William Barnes."

On the 24th of December, 1836, Jim was seen at the house of the prisoner, in the suburbs of the village of Edgefield, in company with the prisoner, nailing boards upon his pailings. The paper found in possession of the runaway, was proved, by A. B. Addison, Esq., to be in the handwriting of the prisoner; he had seen him write twice; of the first occasion on which he had seen him write, he said he had no recollection, at the time the prisoner was arrested; and, therefore, he requested him, in his presence, to write his name, which he did, and it was from his knowledge thus acquired, that he thought the paper was the handwriting of the prisoner; he was shown a paper, which afterwards was proved to have been written by Thomas Blease, the brother of the prisoner, and said that it looked like the writing of the prisoner, though not so much as the paper taken from the possession of the runaway. He said that the prisoner's pronunciation was very like the spelling of the words in the paper; he drops the "h" in some words, and sounds it in others, to which it does not belong. An order, admitted by the prisoner to be his genuine handwriting, was offered by the State, and admitted by the Court, notwithstanding it was objected to by the counsel for the prisoner.

The rule on this subject is stated by the Court of Appeals in the case of *Bowman* vs. *Plunkett*, (2 McC. 518,)(*a*) to be, that where there has been *prima facie* proof of handwriting, and it is still a doubtful question, genuine writing of the party may be submitted to the Court and jury, to enable them to decide, by comparison, whether the writing produced be that of the party. This rule was laid down in a civil cause, but I am not able to discover why it is not a proper rule in a criminal cause. In one, as well as the other, it is intended to answer a question of fact by the best means in our power. The prisoner had resided at Edgefield for a few years, and during that time had been industrious and correct in his dealings; and the witnesses all agreed, that they had heard nothing against him until this affair occurred—and, therefore, said he was of good character. It was objected, on the part of the prisoner, that he could not be guilty under the Act of 1754, inasmuch as the Legislature, at the last session, had provided a different punishment for giving a ticket or permit to a slave. The Act of 1836,(*b*) was not before me, and could not then be obtained, as the Acts (from the fault of the State Printer, or the Secretary of State) had not been sent to the different districts for distribution. I had, therefore, to judge of the law from the statement which Mr. Speaker Wardlaw was able to give from memory; and I am gratified to find, on meeting with the Act at the last Court on my circuit, (10th April, 1837,) within twelve miles *of the capital, that no error [*474 was committed in this behalf It provides, "That if any person shall give a ticket or written permit to any slave, the property, or being under the charge of another, without the consent or against the will of

(*a*) Sup. 129; 3 Rich. 383. *An.* (*b*) 6 Stat. 552. *An.*

the owner or other person having charge of such slave, authorizing such slave to be absent, or to deal, trade or traffic, such person shall be liable to be indicted, and on conviction, be punished by fine, not exceeding one thousand dollars, and be imprisoned not exceeding twelve months; the entire fine thus imposed, to be given to the informer." I thought, and so instructed the jury, that this Act provided for a different offence from that before the Court. As to the first branch of the Act, it was nothing more than a re-enactment of the 4th section of the Act of 1740, with an increase of the penalty. Construing it by that, or as in *pari materia*, it was plain that it was intended to punish the giving to a slave a pass for occasional absence, unconnected with the fact of running away. In this case, under the Act of 1754, it was necessary that the pass should have been delivered to the slave, to aid him in running away and departing from his master's service. I thought, and so instructed the jury, that if the paper found in the possession of the slave, was delivered to him by the prisoner, with the intent to aid him in running away, that then the prisoner was liable to the penalty of the Act of 1754. In deciding upon the prisoner's guilt, I told them that every thing depended upon the fact, whether the paper found in the possession of the slave, was the handwriting of the prisoner; if it was, from that fact, and the further fact that the slave, just before running away, was seen in the company and employment of the prisoner, they might presume he delivered the paper to the slave to enable him to run away. In deciding upon the handwriting, I told them that *prima facie* proof had been made, which might be rebutted by the want of opportunity, on the part of the witness, to be familiarly acquainted with his handwriting; the fact that he doubted whether the paper written by Thomas Blease, was not written by the prisoner; a comparison with that paper, or the order admitted to be genuine. So the proof might be corroborated by the skill of the witness in judging of handwriting, and their own opinion, on comparison, of the identity of the handwriting of the genuine order, and the paper found in the possession of the slave. Though it appeared to me, I said to the jury, that there was more similitude of the paper found in the possession of the slave, to the paper written by Thomas Blease, than to the order written by the prisoner. But I told them, the question of handwriting was one of fact merely, and for them alone. I explained to the jury, that if they entertained a reasonable doubt, upon the facts proved, of the guilt of the prisoner, they ought to acquit him. The jury found the prisoner guilty; and I cannot say that I am dissatisfied with it.

*475] *The prisoner appeals, and moves in arrest of judgment and for a new trial, on the grounds of misdirection by the Court, and error in law.

Appeal determined at Columbia, Fall Term, 1837.

Curia, per BUTLER, J. The ground taken in arrest of judgment, cannot be sustained, according to the view which has been taken of it by a majority of the court. The defendant is indicted in the words of the statute which created and defines the offence with which he is charged. He is definitely and directly charged with aiding a slave in running away, so that his master was deprived of his service. The name of the slave and the name of his master; the time, place and fact of rendering

the aid, and the purpose for which it was rendered, and its accomplishment, are all stated. These are the facts and circumstances which constitute the offence; and of which the defendant had a right to be informed for every legal purpose. That is, that he might be enabled to judge, whether or not, he was charged with an indictable offence, and to enable him to plead a conviction or acquittal on this indictment, in bar of another indictment for the same offence; and also to enable the court to pronounce a certain judgment on it.

The means which a defendant may use in the commission of such a crime, might be innocent in themselves, separately considered, and as various as the device and craft of men could suggest, It would have been no crime for the negro, Jim, to have rode the defendant's horse; for defendant to have given him money and a ticket to go on the railroad, or a letter to a captain of a vessel. Each one of these things may be done innocently; and they become criminal, only when they are used as means to effect a criminal purpose. If they should enable a slave to run away, so that his master loses his service, by the design of the party who employed them, a crime would be perpetrated, by the end which they had effected. It is the end accomplished, and not the means employed, that constitute the offence. I can perceive no more reason for setting out in an indictment, the means used in aiding a slave to run away, than to set them out in an indictment for stealing and inveigling a slave. In the two latter cases it never has been thought necessary. These offences are created and enumerated in one clause of the same statute, the statute under which the defendant is indicted. It would be as impracticable, and as little necessary to state the means used in the one as the other; some of the same means might be used in all of them. It might be a very effectual means of stealing or enveigling a slave, to give him a ticket. The purpose for which it might be given would characterize the offence. A case can be put, in which it would be impossible to set out the means employed in aiding a slave to run away from his master, and yet, a defendant would be clearly guilty. Suppose a party were to admit, openly and without *disguise, deeming it a merit rather than a crime, that he had procured A. B.'s slave to run away, and that he [*476 had furnished him the means to make his escape to Boston, could he not be convicted by his own confession, upon an indictment, charging his crime in the words of the statute, without specifying any means? The very attempt to set out the means might, and would frequently, defeat the indictment; for nine times in ten, the evidence would show different means from those set out; and it is a settled rule, that the means must be proved as they are set out, when it is necessary to set them out in an indictment. There is a class of cases in which it is necessary to set out the means by which the offence is committed. When the particular means which are used to effect a criminal object, are essential to constitute the offence, it is a general rule, that such means must be described on the record, to enable the court to see that the jury have founded their conclusion on proper premises. A single instance will illustrate this position. In an indictment for obtaining money by false pretences, it is necessary to specify the pretences, to see whether they fall within the purview of the statutes. It is necessary, because some pretences are not enumerated in the Statutes of Henry the 8th and George the 2d. If

there were a statute against carrying bowie knives and other deadly weapons, enumerated, an indictment under it should specify the weapons prohibited. In an indictment for libel or swindling, the libellous publication and the fraudulent practices should be set out, because they constitute the offence. And so of other offences of the like kind. But not so where the means are indifferent, and the end effected by them is the offence. Adjudicated cases will only serve to illustrate these positions and distinctions. *Telley's* case, reported in Leach, is nearer like the one under consideration, than any other quoted. The defendant was indicted under the statute of George the 2d, against aiding and assisting of persons to attempt to escape out of lawful prisons. The indictment stated, that defendants were aiding one Jodell Idswell to make an escape, then and there being a prisoner, &c. Objections were taken to the indictment, on a motion in arrest of judgment; but it was not contended that the means used should have been set out; thus conceding that it was unnecessary; as far at least, as it could be negatively conceded. I think it far from being an unimportant circumstance, that the solicitor has pursued the form prescribed in Grimke's Justice. The precedent was taken, no doubt, from some form of indictment made out by some skilful and experienced Attorney General living in Charleston; for it is known that Judge Grimke's precedents were collected in this way. In the case of the *State* vs. *Cantrell*,(*a*) decided in 1834, Judge O'Neall has laid down, very correctly, the distinction where the words of the statute should be pursued, and where the offence should be otherwise more fully and particularly described.

*477] *In the first ground taken for a new trial, it is contended, that if the defendant was guilty of any offence, it was that described in the Act of 1836. By this Act, it is made a misdemeanor to give another's slave a ticket without authority to do so. But because it may be a misdemeanor, in itself, to give a slave such a ticket as that contemplated in the Act of 1836, it does not follow that it may not also be a means used in the commission of a crime. If it be given with a view to aid a slave to run away, in defiance of his master's authority, and not to return, so that the master may lose his property in the slave, it must be regarded as a means to commit a crime under the Act of 1754. If, however, it be given to a slave, by one not having authority, to enable him to be absent, but in contemplation of his return to his master's authority; or to enable a slave to go, and from place to place, to trade or attend to some business of the person giving the ticket, it would be regarded as a misdemeanor, under the Act of 1836.(*b*) In the Act of 1740, the form of a ticket to be given to a slave is prescribed; and in a subsequent clause, a fine is imposed on any one who shall give such a ticket without authority. The Act of 1836 should be construed in reference to this Act, both as to the character of the ticket, and the offence which may be committed by giving it. The 2nd ground for a new trial, involves a question of fact which belonged to the jury. The 3rd and 4th grounds, depended on the character of the evidence given by Mr. Addison. From the report of the presiding judge, and the admissions of the Solicitor, and the counsel for the defendant, the witness testified as follows :—That he had seen the defend-

(*a*) 2 Hill, 389. *An.*

(*b*) 7 Stat. 308, § 3, 4. *An.*

ant write but twice, once in signing his name some years ago, just after he arrived in this State; and the other time, when the defendant signed his name to a recognizance on his admission to bail. He, witness, never saw prisoner write anything but his name. The ticket offered in evidence, did not have the name of the prisoner. The first signature had made no impression on the mind of the witness, and he did not pretend to have formed any opinion from that. The witness saw another signature, to an order which the prisoner had acknowledged to be his; and which the witness identified, by having written a certificate beneath it; this, and the signature to the recognizance, formed the only legitimate source of witness's primary information and opinion of the prisoner's handwriting. These may have made an impression on the mind of the witness, and have fixed such a standard in it, as to authorize him to give an opinion on the disputed paper.—The question is, had he such a standard, to which he could refer for his belief and opinion, independently of the papers themselves; and which it seems were in court? (*a*) Or had he formed his opinion by a comparison of the characters of the different papers? Upon this, in some measure depended the *prima facie* testimony of the witness, which was the predicate of all that followed; and it seems to me that what followed, had more influence on the witness's mind than anything else, to wit—the *peculiar pronunciation of the prisoner, and an actual comparison of handwriting on the [*478 stand. The presiding judge left it to the jury to decide the case, in some measure, on the skill of the witness. "A person who has seen a witness write, and retains no distinct recollection or impression of the handwriting, may revive his memory by looking at the paper he saw written; yet, he will not be allowed to form his opinion from any supposed knowledge which he may have acquired by comparing the characters of the respective writings."—(See 4 Carr. & Payne, p. 1.) These reports are found in Eng. Com. L. Rep. vol. ——. The practice of allowing witnesses to testify, at all, from their supposed skill in comparison of hands, is now exploded in the English courts, as may be seen by the cases referred to in the case I have quoted. Mr. Addison certainly had some reference in his mind to the characters of the signature which he saw made. He may have had no impression existing in his mind independently of these papers; if so, his mind had come to its conclusion, rather by reference to them, than by referring to a standard previously existing in his own mind. The witness certainly made a comparison on the stand; and whether the whole of his testimony was not founded on comparison, or supposed knowledge, acquired by comparison, is not entirely certain. When a witness has distinctly given competent evidence of handwriting, proving it, *prima facie*, the auxiliary, and in my mind, the unsatisfactory, testimony by comparison may be resorted to. The case of *Bowman* vs. *Plunkett*, assumes that competent, but doubtful, evidence, had been given before comparison by the witness of writings admitted to be given, was allowed. I do not wish to lay down any rule in conflict with that opinion; I will only say, however, if that had been a criminal case, it would have been probably sent back for a new trial. Doubts arising upon nice distinctions of law, should be solved in favor of the accused;

(*a*) See 3 Rich. 383. *An.*

and to say the least of it, this case is not free from doubt on the law. In capital cases, this consideration should have its influence. To sit in judgment on the life of a man, is the highest power that can be delegated to, or exercised by, any human tribunal; and should never be exercised but in conformity with the prescriptions of strict law, and upon satisfactory testimony. Unrestricted testimony and shrewd conjecture, may frequently result in truth, and aid justice; but in times of agitation, they may be made use of, as fatal means, to gratify the demands of prejudice, and subserve the ends of tyranny. Strict law is a fortress of protection and defence, in times of violence. It is right that we should maintain our peculiar institutions, by a faithful, fearless, and impartial administration of the laws of the land. But justice should balance nicely with her scales before she strikes with her sword.

Let the defendant have a new trial without prejudice.

EVANS, GANTT, and RICHARDSON, JJ., concurred.

*479] *EARLE, J. Although I entertained a different opinion at the argument, I incline to agree that the indictment may be good, without averring or setting out the means by which aid was offered. On a sound construction of the Act, however, it seems to be conceded, that the offence was not complete on the part of the defendant, unless the slave did actually run away. This fact, therefore, constitutes a material part of the charge, and should have been alleged, as a distinct substantive averment, with time and place, in order to bring the offence within all the material words of the Act; nor is it sufficient that such fact be supplied, as it is in this indictment, by periphrasis, intendment or conclusion. (2 Hawk. 354, ch. 25.)(a) It is a mistake to suppose, that it is always sufficient to allege the offence in the mere words of the statute; for where it consists of several acts, they should each be averred, with the same particularity as at common law. This exception was not argued at the bar; and the Court has not considered it. But I am unwilling to sanction, even by silence, a defective pleading in a capital case. I think the indictment insufficient. The second count does not set forth the charge with sufficient certainty and precision. I concur fully in granting the motion for a new trial, on the grounds presented by Mr. Justice Butler.

Wigfall and *Wardlaw*, for the motion. *Caldwell*, Solicitor, contra.

NOTE.—The grounds of appeal in this case could not be furnished by the Clerk of the Appeal Court, from their not having been filed, I presume, with the original papers; which will account for their omission here.

REPORTER.

See Infra, 488, *State* vs. *Le Creux*. *Ed.*

(a) 1 Rich. 184; 3 McC. 441. *Ed.*

*A. J. DILLARD *vs.* JEANNETTE WALLACE. [*480

Where an overseer has been guilty of neglect, and some small departure from the terms of his contract, and these are known to his employer, and he is still continued as her overseer, it will be considered as a waiver of them as grounds to rescind the contract.

Before O'NEALL, J., Union, Fall Extra Term, 1837.

This was an action of covenant brought for the recovery of the plaintiff's wages as the defendant's overseer, at the place called the Meadow Woods. The defence was various, to wit., that the negroes had been worked in too cold weather, that one was whipped improperly, that an old woman and the milk woman were employed by the overseer differently from his employer's instructions, that the plaintiff had ground and eat some of the defendant's wheat, that he had not gathered any peas, that the fodder was so badly handled and put up that the whole was injured, and two stacks were wholly worthless; that the defendant's cotton was either fraudently packed, or picked out and packed in such a wet state as to ruin it, and that the crop of Col. Gist, or a part of it, which the defendant was bound to pick and pack, was by the plaintiff fraudulently packed. The proof was very clear and abundant that the plaintiff made an extraordinary crop, one hundred and six bales of cotton, and four thousand five hundred bushels of corn. The defendant made no objection, at any time, to the payment of his wages; that he had not planted as much corn and sown as much oats, as he was by his contract bound to have done. It was during the argument that this objection was raised. I thought the evidence would warrant the jury in presuming that the crop had been planted according to the contract There was some evidence, that, during the extreme cold weather in February, 1335, the defendant's negroes were at work, and kept from the fire by the plaintiff; it also appeared that in the course of the winter, 1834–1835, a negro man of the defendant's, (Leckie,) was badly frost bitten; but whether this was from the act of the plaintiff, did not appear. The plaintiff whipped a negro woman for sending a child from Meadow Woods to the defendant's house, the defendant complained about it, and the plaintiff said if he had done wrong he was sorry for it. An old woman, whose duty it was to attend to the children, was put to milk the cows. And a woman (Minder,) who had previously milked, and who was a crop hand, was put to cook; this was after the plaintiff's marriage, in the summer or fall of the year; the defendant knew of it, complained about it to the plaintiff, but still suffered him to go on as her overseer. The defendant had kept some wheat for seed at the Meadow Woods, she abandoned the idea of sowing it, and then the plaintiff had two or three bushels ground into flour and used it. This fact was also known to the defendant, and on her son making some objections* the plaintiff [*481
said he could not live on nothing. (If I recollect correctly, the defendant was to find the plaintiff.) Upon these several facts and the defences arising out of them, I thought that the defendant's knowledge of them, and subsequent acceptance of the plaintiff's services as her overseer, was a waiver of them, as grounds to rescind the contract. If she

had sustained any damage thereby, she might have claimed for it by way of discount, but she had not filed any discount in the case.

As to the crop of peas, there was some evidence, from the plaintiff's own declarations, to show that a large quantity was made. None was gathered. But it appeared satisfactorily from the evidence of Col. Martin, that although a large crop was planted and promised finely, yet that the early frost prevented it from maturing. In the progress of the case, Mr Thomson proposed to show that the plaintiff had received the proceeds of the defendant's negroes' crops, (say $163,) and claimed a deduction for the same from his wages. To this it was replied by Mr. Dawkins, that the plaintiff had either paid it to or for the negroes, according to the defendant's instructions, and that not expecting such a defence, they were not then prepared to meet it; he therefore objected to the defendant's defence, in this behalf, on the ground that she could only claim it by way of discount, which not being filed, she could not be permitted to give any proof touching the matter. The objection was sustained. In the progress of the case, Mr. Thomson referred to the Act of 1747, P. L. 215, by the 3rd sec. of which it is enacted that if the overseer employ any of the negroes of his employer, upon his own account, he shall pay 10*s.* per day to the owner: the same Act directs that this shall only be recovered before a justice of the peace, and that the information of the negroes shall be sufficient evidence to charge the overseer, unless he will exculpate himself by his own oath. I thought, and so ruled, that the objections to any defence arising out of this Act, were fourfold: first, that there were no facts proved in the case to which it could apply: second, that the 10*s.* per day was a penalty, and could only be recovered, (if at all,) before a justice of the peace: third, that if recoverable here it could only avail the defendant by way of discount: and fourth, that the Act was obsolete. These observations dispose of what I regard as the *mere trash* of the case, and brings the court to the main and the real defences.

1st. As to the fodder: Wm. R. Wilburn, Dr. Peak, Warren Taylor and Col. Gist, thought the whole fodder, (20 stacks,) was put up wet and was rotten and worthless. Mr. J. W. Williams, a very experienced planter and overseer, said that two of the stacks were bad. Mr. Daniel Wallace said several were bad: the plaintiff, on the day of the first examination of the fodder, brought some bundles from the gin house which were good, and said that that in the stacks when put up was equally as good, and he could not account for it becoming injured. Messrs. Wilburn and Taylor
*482] said the *fodder had been put up too green. Col. Martin and Mr. Browning said the season for taking fodder was a broken one, the early part good—the middle bad, and the last good: they both spoke of a field of 40 acres being pulled by the plaintiff on a day which promised to be fair, but before it could be taken up it rained upon it. Mr. Ambrose Ray, a very intelligent and respectable farmer of the neighborhood, said that 18 of the stacks of fodder were good, two were bad: that their condition resulted from the blades being wet by rain after they were pulled. This part of the case seemed to me to present a naked question of fact; if the jury concurred with Wilburn, Taylor, Peak and Gist, they might find for the defendant; but if on the other hand they concurred with Mr. Ray, they might find for the plaintiff.

2nd. As to the defendant's own cotton crop, the proof was somewhat

various: it was not nicely handled in picking it out: it was somewhat trashy, and some of it was wet. This might have been the fault of the owner; for the proof was, that to enable Mr. Rice, who had married one of the defendant's daughters, and who was about removing to Mississippi, to get some of the negroes, the crop was gathered very rapidly. The proof was clear, that at least one bale of the defendant's cotton had been packed too wet and was spoiled; some of the witnesses thought that two bales were in that condition. Thirteen bales were opened, and Col. Gist thought they were all unfit for market. According to the plaintiff's and defendant's contract, he was to have $3 for every bale weighing 310 lbs. In this parcel of 55 bales which were alleged to be fraudulently packed, many of them weighed less than 310 lbs. and I am not certain that any exceeded it. The whole crop of 106 bales, was sold at a general average of $15 20 per cwt. This was as much as was generally realized for the crop of 1835, by the neighbors Upon this part of the case I instructed the jury, first, that if the plaintiff fraudulently packed a single bag of the defendant's crop; or second, that if the cotton was, by his direction, or by his neglect, picked and packed when too wet, that then in either of these cases, they might find for the defendant.

3rd. As to Col. Gist's cotton. He proved (and about the facts stated from his testimony there can be no doubt,) that part of his Tyger River crop, 48 bales, were ginned at the defendant's gin at Meadow Woods under a contract with her; 18 bales brought a fair price, four of the remaining 30 were plated, and the other 26 were wet. The overseer of Col. Gist went with the cotton to the gin, and was present at the packing of the 30 bales, either in part or in the whole. Upon this part of the case, I instructed the jury that if the plaintiff fraudulently packed Col. Gist's crop, then on this ground they ought to find for the defendant.

The jury found for the plaintiff his entire wages; and as the questions were naked questions of fact, I should not be disposed to disturb the verdict.

*GROUNDS OF APPEAL. [*483

1. Because the contract was not proved as laid; the plaintiff was bound by his contract to plant as much as two hundred acres in corn, and as much as eighty or ninety acres in oats, and there was no proof as to the quantity of either.

2. Because the defendant should have been allowed some deductions from plaintiff's wages as her overseer, as it was clearly proven that the cotton and fodder were greatly damaged, and still he was allowed by the jury his full wages.

3. Because the Court erred in charging or instructing the jury, that the defendant could not overlook any fault or offence of the plaintiff, without forever barring herself from recurring to the same again, as a ground of complaint, even in conjunction with subsequent violations of the duties of his station, but that she must complain at the time of the act done, or she could not be heard in Court.

4. Because the Court rejected evidence as to $163 in the hands of plaintiff, belonging to defendant, which he had received as her agent while acting as her overseer, the proceeds of cotton sold for her negroes, on the ground there was no discount filed, when in fact that was a part of his duty as her overseer.

5. Because the Court ruled that the Act of 1747, under the head of "overseers of plantations," was obsolete.

6. Because the cotton was certainly fraudulently packed, and the fodder put up in a rotten condition, or soon became so; and whether these things occurred

in consequence of fraud or negligence on his part, the legal consequences were the same.

7. Because the verdict was against law, and the evidence, and the charge of the judge.

Curia, per EVANS, J. I have looked into the agreement and the declaration in this case. The declaration is in the common form, setting out the agreement, and averring a general performance on the plaintiff's part. The plea alleges three breaches; first, that the plaintiff did not plant the quantity of corn and oats stipulated in the agreement; second, that he did not take proper care of the negroes, and horses, mules, &c.: third, that he did not take proper care of the crop made on the plantation. These were the breaches alleged, and upon which the issues were founded, as I suppose, for no part of the pleadings, subsequent to these, have been furnished the Court. Upon this state of the pleadings, and the report of the presiding Judge, this case is to be decided.

On the first ground, I would remark that, if there had been no proof of performance, or the plaintiff had proved a different contract from the one set forth in the declaration, or if the consideration consisted of various parts, as in *Brooks* vs. *Lowry*, (1 N. & McC. 342,) and they were not *484] set out *in the declaration, and substantially proved on the trial, the plaintiff must have failed; but in this case, every part of the contract is set out, and performance of the whole averred. Now, if the plaintiff had offered no proof of performance, he should have been nonsuited. But as some evidence was offered on this point, and as this evidence was satisfactory both to the jury and the presiding Judge, this Court is not disposed to disturb the verdict on that ground.

The second and the sixth ground are substantially the same, and involve the question made in the third assigned breach, to wit, that the plaintiff did not perform his duty in gathering the fodder and in packing the cotton. The evidence of default in these particulars is very strong, and I certainly should not have been disposed to disturb the verdict if the jury had found for the defendant. But my experience has taught me that a jury who know the parties and the witnesses is much more competent to decide pure questions of fact, than a Judge who is an entire stranger. And if to this be added, that the Judge who heard the evidence and understood the case much better than I can from a written report, has certified that he is satisfied with the verdict, I think it would be unwise to interfere. I would not have it understood, that by the sanction of this Court, juries are to be allowed without control to sport with the rights of litigants in court. If they undertake to decide without evidence, or capriciously to disregard the facts of the case, a new trial ought to, and so far as depends on me, will, be granted. But I cannot say it has been done in this case; and the defendant's motion on these grounds must fail.

As to the third ground, which alleges error in the charge of the presiding Judge, in relation to some small departures of the plaintiff from his duty, I agree with him. The facts were known to the defendant when they occurred. It might have justified her in putting an end to the contract, or entitled her to an abatement in the price by way of discount; but surely it cannot be allowed, after an overseer has served faithfully to the end of the year in all other particulars, that his employer shall avoid the payment of the whole wages for some fault committed in the begin-

ning of the year. I concur with the presiding Judge (*a*) "that the defendant's knowledge and subsequent acceptance of the plaintiff's services as her overseer, was a waiver of them as grounds to rescind the contract." I think the Judge decided correctly in rejecting the evidence in relation to the negroes' crops. If it were a part of his duty as overseer under the contract, it should have been assigned as a breach, or some notice as a discount should have been given to enable him to meet the charge.

In relation to the fifth ground, I would remark that this Court does not agree with the presiding Judge, that the overseer's Act of 1747, (*b*) is obsolete. I am not aware of any attempt to enforce it, but I do not think the non user has been long enough or sufficiently established to declare the Act *obsolete. In all other respects, the opinion of the Judge is correct, and needs no further illustration. [*485

Upon the whole, I am unable to discover any error in the charge of the judge or the verdict of the jury which would authorize the interference of this Court; and the motion is refused.

GANTT, RICHARDSON, EARLE, and BUTLER, concurred.

A. W. Thompson, for the motion. *Dawkins*, contra.

THE STATE *vs.* R. IRBY, ADM'R OF C. IRBY.

It is a part of the official duties of a coroner to collect tax executions that are placed in his hands, where the sheriff of the district is the tax collector; and his securities are liable for his neglect, or any default which he may make, in not collecting them, &c.

Before EVANS, J., at Marlborough, Fall Term, 1836.

The special verdict in this case finds that Charles Irby was one of the securities of George B. Whitfield, formerly coroner of Marlborough district; that Joshua David, then sheriff, and also tax collector, for the said district, issued and lodged with the said Whitfield, the coroner, divers tax executions, for which he never accounted; and presents the question whether the securities of Whitfield are liable for this default. This presents the question, whether the collection of these tax executions was a part of the official duty of the coroner. By the Act of 1803, (see 2 Brev. 289,)(*c*) the tax collectors are required to place their tax executions against such as "shall make default in payment of their taxes, for collection in the hands of the sheriff, or coroner, when the sheriff is interested, of the districts respectively, and in the hands of no other person whomsoever."

By the Act of 1706, (1 Brev. 186,)(*d*) the coroner is directed to serve all writs or processes directed unto him, against the provost marshal, and also in all causes in which the marshal is plaintiff. This Act is sufficiently comprehensive to authorize the coroner to execute any tax

(*a*) *McCracken* vs. *Hair*, 2 Sp. 258. *An.*
(*b*) 3 Stat. 697; see 10 Rich. 131; 11 Rich. 172. *An.*
(*c*) 5 Stat. 456, § 18. *An.* (*d*) 2 Stat. 273, § 11 *An.*

execution issued against the sheriff; and the Act of 1803 must have contemplated other cases than such as the sheriff was defendant in. The *486] words are, "to the *coroner, when the sheriff is interested." Now, it seems to me, that the sheriff is interested in the tax executions issued by himself; and that the Act of 1803 was intended to enforce the case under consideration. It is therefore considered that the *postia* be delivered to the plaintiff.

GROUND OF APPEAL.

Because the collection of the tax executions was not the official duty of the coroner, and his securities are not liable for his neglecting to collect them.

Curia, per EVANS, J. This Court concurs in the opinion of the presiding judge, and the motion is refused.

GANTT, RICHARDSON, BUTLER, and EARLE, JJ., concurred.

Graham, for the motion. *Withers*, Solicitor, contra.

See Act of 1839, 11 Stat. 54, § 41.

JESSE B. TURNER *vs.* D. WALLACE, ADMINISTRATOR.

The plaintiff lived with his father (defendant's intestate) from 1828 up to the time of his death in 1834, in the capacity of an overseer, for which he was to receive a certain portion of the crops annually.

It appeared that he never received all of his share of the cotton crops before the death of defendant's intestate, and that his father acknowledged to one witness that he owed his son more than the value of a certain slave called Anthony, whom he intended the plaintiff should have, over and above his distributive share of his estate. Defendant's intestate made a will, but for want of proper attestation it was not admitted to probate; in that he left the boy Anthony to plaintiff: *Held*, that there was a sufficient consideration to support the action of assumpsit, and the verdict of the jury for the plaintiff was sustained, and a new trial refused.

Before O'NEALL, J., at Union, Extra Fall Term, 1836.

This was an action of assumpsit, to recover the sum of $800, for work done for the intestate, by the plaintiff, who was his son.

In 1828, the plaintiff was about removing; the deceased said he must not go; it would ruin him. He and his family, from that time to the death of Mr Turner, in 1834, lived on the plantation of the latter. The *487] plaintiff attended* to the farm, and all of his father's business. The crops of corn were divided, the cotton crops were sold, and according to the testimony of Mrs. Turner, (the widow of the deceased,) the proceeds were paid to the deceased. The plaintiff got sugar and coffee, generally at the stores in the neighborhood. His debts were generally paid by his father during the whole time he lived with him. The deceased admitted that he was in debt to the plaintiff, and said that at his death he would leave him enough to make it up to him. Shortly before his death, not more than four days, he attempted to make a will,

but from not having it properly attested, it could not be admitted to probate. In that paper he bequeathed to the plaintiff, over and above an equal share of his estate, a negro man named Anthony. He told Mr. Page, who drew that paper, that he owed the plaintiff more than the value of Anthony, and wished therefore to secure him to plaintiff. Anthony sold at the sale for rather more than $800. The year in which the deceased died, the plaintiff retained out of the cotton crop sold, one-fourth, as his share. The plaintiff administered on his father's estate, but his administration was revoked; in a few months, he came to an account before the Ordinary, and did not then make his claim.

The Court thought the case one entirely of fact, and after overruling a motion for a nonsuit, submitted the case to the jury, stating to them that they must be satisfied, before they could find for the plaintiff, that the defendant was liable to pay him for his services, that he was in arrear to him, on that account, and that at the time of making his will, he admitted that he owed the plaintiff as much as the value of Anthony. The jury found for the plaintiff.

The defendant appeals on the annexed grounds:

For a *nonsuit:*

1st. Because there was no legal promise proven, or any consideration upon which the action can be sustained.

2d. Because the evidence did not take the cause out of the statute of limitations, which was pleaded.

3d. Because, from the evidence, it was fairly to be presumed old Mr. Turner intended what he said as gratuitous.

For a *new trial:*

1st. On the same grounds, so far as they are applicable to this motion.

2d. Because, it appeared clearly from the evidence, there was no consideration to support a promise, as the plaintiff received full compensation for his services on his father's plantation, and there was no other consideration attempted to be proved.

Because the verdict is contrary to law and evidence.

**Curia, per* GANTT, J. We see no reason for disturbing the verdict of the jury, and the motion is dismissed. [*488

The whole Court concurred.

Herndon, for the motion. *Dawkins*, contra.

See *Hunter* vs. *Hunter, Ex'or of Finley*, 3 Strob. 321. *An.*

IN THE COURT OF 3.

THE STATE *vs.* JOHN LA CREUX.

In an indictment for inveigling, &c., Edmond, the slave of L. J. Cross, it was held not necessary to allege that L. J. C. was the owner or employer of the said slave. It is sufficient if the charge is laid, "one negro slave of L. J. C."

The material words of the statute under which an indictment is framed must be used.

It is not necessary to allege in an indictment by what means or how the prisoner aided the slave in departing from the service of his master.

Before RICHARDSON, J., Orangeburgh, October Term, 1835.

This was an indictment for inveigling, &c., the slave of L. J. Cross, named Edmond, and containing an account for aiding Edmond to run away. Several objections were made to the form of the indictment, which were overruled by the Court.

J. Whitemore and Taylor proved a pretty clear case of inveigling, and the jury found a verdict of guilty, from which the defendant appeals, and moves in arrest of judgment, upon the grounds set forth in the notice of appeal. The motion for a new trial depends upon the precise evidence, and that in arrest, upon the form of the indictment, and require no further report of the case.

GROUNDS OF APPEAL.

1. Because the indictment does not allege whether the said Leonard J. Cross was the owner or employer of the said slave Edmond.

2. Because the first count in the indictment alleges that the prisoner inveigled, stole, and carried away the said slave, which is repugnant and void.

3. Because in the said first count, the prisoner is indicted partly under the first and partly under the second clause of A. A. 1754. (*a*)

*489] *4. Because, in the second count, it is not alleged by what means and how the prisoner aided the said negro in running away.

5. Because the two counts state distinct and different offences, which make the indictment repugnant and void.

And for a new trial. 1. Because there was no evidence at all to support the second count.

2. Because the evidence offered was insufficient to support the first count.

3. Because the verdict was, in general, contrary to evidence and law.

**Curia, per* O'NEALL, J. The prisoner has moved, upon various grounds, to arrest the judgment; the first of which is, that the indictment does not allege that the said Leonard J. Cross was the owner or employer of the said slave. The charge is laid "one negro slave of Leonard J. Cross." This is sufficient. For the statute does not make it necessary that the word owner and employer should be used in the indictment, in order to bring the offender within the statutory definitions, which is to "inveigle, steal, or carry away any slave, so that the owner or employer of the said slave shall be deprived of the use and benefit of the said slave." It is enough if such words are used as show from whose possession the slave was inveigled, stolen, or carried away, and that this

(*a*) 7 Stat. 426. *An.*

person, who is in law regarded, for the purposes of a case like the present, both as owner and employer, was deprived of the use and benefit of the said slave.

The second ground is, that the charge in the first count of the indictment, that the prisoner inveigled, stole, and carried away the said slave, is repugnant and void. This supposes that at least two distinct offences are charged by the words used; but this is not necessarily the case. For to inveigle, so that the owner or employer be deprived of the use and benefit of a slave, is to steal and carry away; and although there may be cases of a stealing and carrying away in which there is no inveigling, this does not render a charge in which all are contained, repugnant and void. It only superadds, and the circumstances which must be proved to make out the offence is laid.

The indictment is in the material words of the Act of the Legislature, and this is the well-established rule by which such an indictment is to be framed. (Stark. Crim. Plead. 249.) It conforms, in using all the words of the Act, although they import more offences than one, to the precedent under 7 G. 2, c. 21; Stark. Crim. Plead. 244; and also under the 45 G. 3, c. 89, for forging a bank note, 3 C. C. P. 1049.

The third ground is, because the prisoner is indicted partly under the first, and partly under the second clause of the Act. This supposes that the words "so that the owner or employer be deprived of the use and benefit of the said slave," applies exclusively to the second clause, and not to the first. This is not so, they apply to both, as will be seen by referring to Covington's case, 2 Bail. 569.

*Fourth. It was not necessary to allege by what means or how the prisoner aided the negro in running away and departing [*490 from the service of his master. The fact is charged in the words of the Act: and it would be just as reasonable to ask that the means and manner of inveigling should be stated.

Fifth. If the counts are for distinct and separate offences, it would be no ground on which to arrest the judgment.(*a*) The prisoner might have asked and compelled the prosecutors to elect on which the case should proceed. Not having done so, the conviction can be applied to either, and on either, enough appears to justify the judgment of death against the prisoner. The facts proved, however, apply to the first count, and to that, the Court is bound to refer the verdict. This is also an answer to the first ground for a new trial. For it is wholly immaterial whether there was or was not any evidence on the second count.

On the second and third grounds for a new trial, it is sufficient to remark, that the evidence of the prisoner's guilt here, is precisely the same as in Covington's case, and after the labored examination which it received from my brother Johnson, it cannot be necessary to say any thing more upon the subject.

The motions in arrest of judgment and for a new trial are dismissed.

JOHNSON and HARPER, JJ., concurred.

Bellenger, for the motion. *Elmore*, Solicitor, contra.

(*a*) 3 Stat. 514, 516; 2 Bail. 72.

See Supra, 472, *State* vs. *Blease*; *State* vs. *McCoy*, 2 Sp. 714; *State* vs. *Posey*, 7 Rich. 497; *State* vs. *Anderson*, 1 Strob. 460; 3 Rich. 172. *An.*

The defendant was hanged.

IN THE COURT OF 3.

THOMAS EVANS *vs.* HERBERT HINDS.

The docket of the Court in the *sum. pro.* jurisdiction, with this entry, "*Alex. Gregg* vs. *R. J. Gregg—Decree for Plaintiff,*" is not such evidence of a judgment as will enable a purchaser of land at sheriff's sale to recover in an action of trespass to try titles.

Before EARLE, J., at Marion, Spring Term, 1835.

Trespass to try titles. Both parties derived title under Robert J. Gregg. The plaintiff claimed under a sheriff's sale. The original judgment and execution were not produced. They were supplied by the fol-
491] lowing evidence : The sale recited in the deed, was stated to have been under an execution, *Alex. Gregg* vs. *Robert J. Gregg.* The clerk of the Court testified that there are no minutes of the Court of that day which contain entries of decrees under the summary jurisdiction, of which the only evidence now to be found in the office is the dockets. That he cannot find the execution in the above case; thinks all the executions against Gregg are now in Court that can be found. If such an one is in his office, it is not in its proper place. On this evidence the Court admitted the following entry from the docket in evidence :

DOCKET OF MARCH TERM, 1822.

Alex. Gregg vs. *R. J. Gregg.* } Decree for plaintiff.

Original execution book of the sheriff, Tart, contained the following entries :

Alex. J. Gregg vs. *Robert J. Gregg.* } *Fi. Fa. in as't.* *Gee*, Attorney.

Ent. 4 April, 1822.	Decree, . . .	$24 00
	Attorney, . .	9 46
	Clerk, . . .	1 50
	Sheriff, . . .	1 75

Levy on one hundred acres of land adjoining lands of R. Howard. Offered the land for sale in October, and no bid to be had: 6th April, 1824, sold the above land, and knocked off to Elly Gasque, at ten dollars, and same paid; sheriff's deed to Gasque, 6th April, 1824. He conveyed to plaintiff, 22d September, 1830.

Defendant also claimed under sheriff's sale. He introduced a record and judgment of *Richard Howard* vs. *R. J. Gregg*, on a bond, dated Aug. 17, 1822, for $1000, judgment 31st Oct., 1825, execution same day; sale 3d Jan., 1826, to Richard Howard; sheriff's deed same day; recorded, 27th January, 1829.

Several objections were made to the plaintiff's recovery, besides the want of proof as to the existence and loss of the judgment and execution, and the insufficiency of the evidence by which they were supplied. It was alleged the execution of *Alex. Gregg* vs. *R. J. Gregg*, was satisfied. The proof was on that point as follows: Wm. Gregg deposed that Alex. Gregg told him before the sale of the land, that Tart, the sheriff, had paid him up; and afterwards, in the sheriff's office, Howard inquired if he had got his money. He said yes, I have got it; and Tart said he had paid it. Howard said, I am glad of it, for now my mortgage is good. On the same point, R. J. Gregg swore that it was not paid off. There

was certainly no proof of *the payment of costs, for which the land might [*492
have been sold, as well as for the debt itself. The ground assumed was, that the sheriff himself had paid it off with his own funds, and therefore the execution was inoperative ; and it is well settled that the sheriff cannot in general keep open an execution which he has himself paid off; against the defendant he could not enforce it. But if the defendant make no objection, can third persons? It was objected further, that the execution of *Gregg* vs. *Gregg*, was out of date, and therefore inoperative, and the levy was void. It was lodged 4th April, 1822. The sale was made 6th April, 1824. The levy was without date; if made within the year and day which the execution had to run, then the authority to sell was complete, even after the lapse of that period, without renewal. There was no proof on the subject. I submitted to the jury that in the absence of proof, the general principal that public officers will be presumed to have done their duty, until the contrary appear, might aid the plaintiff's case. That it was the duty of the sheriff to levy the execution or return it within the year and day ; if levied, it was not necessary to return it, and therefore as he afterwards proceeded to sell, they might presume that the levy was made within the lawful time. Another objection to the plaintiff's recovery was, that his deed from the sheriff had never been recorded. On this point it was proved by Elly Gasque, that Howard knew of his having purchased the land before he bought ; that he paid taxes for the land, and had a tenant on it. I submitted to the jury whether Howard had explicit notice of Gasque's deed, and instructed them if he had, that the deed was valid without recording.

On the question of fraud in the sale to Gasque, which was much relied on, the evidence was fairly submitted to the jury. Many of the circumstances accompanying the transaction were suspicious. The land was worth six or seven hundred dollars, and sold for ten dollars. In the other transactions about the same time, concerning the negroes of Gregg, and in which the sheriff and Gasque were active agents, there can be no doubt that there was fraud. Yet, both Gasque and Gregg swore that there was no understanding or agreement; that Gasque paid his own money for the land, which has never been refunded to him by any one, and after paid, sold the land to pay his own debts.

I refer the Court to my notes on this point, and to an abstract of the entries in the sheriff's books.

The jury found for the plaintiff, and the defendant appeals, on the grounds annexed:

1st. Because no judgment of the Court was given in evidence, or produced, or shown to have existed, which would authorize a sale of the land by Tart, sheriff, to Elly Gasque.

*2d. Because it did not appear that the execution by which the land is [*493
pretended to have been sold, was of active force at the time of the levy or the sale. It was lodged 4th April, 1822, and the land sold 6th April, 1824. The presumption is, it was not of force, and the Judge should have so charged.

3d. Because the cause of *Alexander Gregg* vs. *Robert J. Gregg*, by virtue of which the sale of the land was attempted, was paid by sheriff Tart, to the plaintiff, long before the sale.

4th. Because the deed made by sheriff Tart, to Elly Gasque, not being recorded, as the law requires, was absolutely null and void as to creditors, of whom Mr. Howard, under whom the defendant claims, was one.

5th. Because the deed from Tart to Gasque, not being recorded, as required by law, was void as to subsequent purchasers, of whom Howard under whom defendant claims, was one, and no notice to Howard before his purchase was proved.

6th. Because the sale by sheriff Tart, and purchase by Gasque, was for the benefit of Tart, the sheriff, and Robert J. Gregg the defendant in execution, and therefore fraudulent and void, and his Honor should have so charged the jury.

7th. Because the verdict of the jury, was contrary to law and evidence.

Appeal determined at Columbia, Fall Term, 1835.

Curia, per O'NEALL, J. The first ground is fatal to the plaintiff's action. For until the judgment was produced, or its existence and loss proved, the plaintiff could take nothing from his purchase at sheriff's sale. The evidence clearly shows that no judgment in fact ever existed, and hence it follows that the execution and sale under it, were alike unauthorized and wrongful. The case of *McCall* vs. *Boatwright*, (2 Hill, 438,) cannot be distinguished from this, and its authority supercedes the necessity of argument or investigation.

The motion for nonsuit is granted.

JOHNSON and HARPER, JJ., concurred.

Graham, for the motion. *Moses*, contra.

See 5 Rich. 372; 10 Rich. 395. *An.*

IN THE COURT OF 10.—1836.

*494] *DANIEL D. FREE *ads.* THE STATE.

To discredit a witness, it is incompetent to offer testimony to prove that the witness has been guilty of stealing.

Where incompetent testimony has been received, and no objection is made at the time of its reception, counsel have the right to comment upon it before the jury.

Before GANTT, J., at ———, Fall Term, 1836.

The defendant was convicted on a charge of trading with a slave. The trading consisted in having sold to a slave three yards of cotton shirting, at twenty cents per yard. Matthew Petigru was introduced as a witness to prove the trading. To show that Petigru was not entitled to credit, testimony was offered, proving that he had been guilty of taking two great coats in Columbia. In the cross examination of Petigru by defendant's counsel, he was asked questions respecting the cloaks, for the purpose of discrediting his testimony. The evidence was conclusive that Petigru did take the cloaks. The first ground taken for a new trial is correctly stated. I did restrain the counsel within the specified limits, and I refused to permit them to draw conclusions from the evidence of Petigru's guilt. I may have narrowed down the rule to the injury of the defendant. The extent to which counsel may go, appears to be clearly settled.

If the jury should be permitted to draw conclusions for themselves after a full development of the real character of the witness, whose testimony is impeached, then the counsel were restricted within limits too confined.

GROUNDS OF APPEAL.

1. Because his Honor, the presiding Judge, erred in refusing to allow the defendant's counsel in argument to impeach the credit of the witness Petigru, by adverting to and relying upon the testimony brought out under the decision of his Honor, that the witness Petigru had stolen two cloaks and a jug.

2. Because his Honor erred in charging the jury that the testimony, that the witness Petigru had stolen two cloaks and a jug, would not impeach his credit, and that they were bound to regard him free from the guilt of larceny.

3. Because without the testimony of Petigru, there was not sufficient credible testimony to warrant the jury in finding the defendant guilty.

Curia, per BUTLER, J. The testimony introduced to show that Petigru had been guilty of having taken two coats, with a view to discredit him, was clearly incompetent; and there is little doubt that the presiding *Judge would have rejected it, if an objection had been made to its competency. I assume, as it is inferable from the facts reported—that no ojection was made to the introduction of the testimony. The question is, how was it to be regarded after it was permitted to go to the jury. Incompetent testimony is frequently received by consent; indeed parties are, sometimes, sworn themselves in their own case. When such testimony is so received, it is usually regarded as competent testimony is—to be believed or not believed, as the jury may think proper. [*495

The effect and influence of testimony must depend upon the minds of those who are to be governed by it. What weight will be given to testimony is a question for the jury, and not for the Judge. No one mind can prescribe limits to the belief of another, nor say what influence evidence is to have in producing belief. The Judge who tried this case says, "I did restrain counsel within the specified limits, (I suppose the limits specified in the grounds of appeal,) and I refused to permit them to draw conclusions from the evidence of Petigru's guilt." This, the Court is of opinion, the Judge could not do. After the evidence was fairly before the jury, counsel had a right to comment on it, as on any other evidence.

The motion for a new trial is granted.

The whole Court concurred.

Gregg, for the motion. *Player*, Solicitor, contra.

See Supra, 458. *An.*

IN THE COURT OF 6 LAW JUDGES.

THE STATE EX REL. JOHN R. DONALDSON *vs.* MEEKIN TOWNSEND.

It is no ground to arrest the election of a Sheriff, and to eject him from office, because the election at one of the polls in the district was managed by one manager, assisted by another appointed by the Senator, under the Act of 1828, p. 39, without any objection being made to the appointment on the part of the representatives.

Before RICHARDSON, J., at Marlborough, April Term, 1837.

Motion for an information in the nature of a *quo warranto*, requiring Meekin Townsend to show by what authority he holds the office of Sheriff.

An election was held for Sheriff of Marlborough, the second Monday of January last; at Brownsville, one of the places of election, the poll was *managed and conducted by one manager, originally appointed, and one appointed by the Senator alone, the other representative being out of the district. By including the poll at Brownsville, Townsend was elected; exclude the poll and he was not elected. There are in Marlborough six places of election, and three managers at each place. On the Thursday after the election, twelve of the managers met at the Court House, counted the votes, including the votes taken at Brownsville, declared Meekin Townsend duly elected, and gave him a certificate. Afterwards, on the same day, and before the hour of four o'clock, P. M., John R. Donaldson, one of the candidates, protested against the election in writing, on the ground that the election at Brownsville, being managed and conducted by only one manager, was illegal and should not have been counted

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Seven of the twelve managers who counted the votes and declared and certified the election, certified that they believe it was illegal and should be set aside. Townsend sent his certificate of election to the Governor and was commissioned Sheriff. The holding of the election by only one manager was a mere irregularity, of which the managers were the proper judges. They counted the Brownsville poll, and their decision is conclusive. The objection to the certificate of the managers was, that the poll at Brownsville should have been holden; it was illegally managed, therefore void. But I considered it, at most, an irregularity, within the jurisdiction of the assembled managers, and their decision conclusive. The election had been fairly conducted at the place and in the manner directed by the Legislature. The appointment of one manager by the Senator, unobjected to by the Representative, was competent. The object of the power given to the Senator and Representative is remedial of a frequent inconvenience (of the absence of one or more of the original managers,) and to ensure a fair election. This object is to be chiefly regarded. I did not perceive, that, even had the poll been holden by one manager alone, that it would have been utterly void, (though irregular,) so as to place the respondent in the situation of an usurper of office, and authorize

this Court to arrest his commission. Such irregular poll would have been the consideration of the managers, not for this Court.

GROUNDS OF APPEAL.

Because, from the facts of the case, information in the nature of a *quo warranto* ought to have been ordered.

Curia, per RICHARDSON, J. The election of sheriff was given to the people by the Act of 1808, 2 Brev. "Sheriff," sec. 71.(*a*) To be managed as the election of Senator and Representatives. The managers of the polls are to declare the result of the election, and certify it. Upon their certificate, the Governor gives commission to the successful candidate, and he goes into office. Under all the evidence of office which I *have referred to, Mr. Townsend presents himself as the rightful incumbent. Is he to be ousted? It has been decided, in the [*497 case of the *State* vs. *DeLesseline*, (2 McC. 53,) that it takes a majority of the managers of all the polls to count the votes and declare the election. And it is now urged, that no less than a majority of the managers for each poll are competent to hold it. But we know that the House of Representatives have upheld as a member, the candidate who received a majority of the votes, including a poll so holden by one or two or more managers. Such a legislative decision is imposing authority, when we consider that Sheriff's elections are ordered to be holden and managed as elections for the Legislature. To this authority we may add, that a distinguished judge has said, in the case of the *State* vs. *Huggins* (State Rep. 139,) that one manager may hold the election. And I should therefore hesitate to say, there being no other objection, that in such case the election would be utterly void. This is the judicial province. We may arrest the certificate and commission, if they infract the law or the constitution of the State. The judges are to see that no usurper of office shall keep it; the rest is within the legal jurisdiction of the managers and the Governor. But there is no necessity for deciding absolutely upon that point. By the Act of 1828, p. 39, the delegation of each district is authorized to substitute managers of polls, in cases of vacancy.(*b*) And in the instance before us, the Senator of the district, in the absence of the single Representative, filled up the vacancy of one of the original managers; and this appointment is not objected to by the Representative. In such a case, when the proper object is merely to ascertain the true vote and appointment by the people of their officer, and that purpose has been answered, as we are assured by the certificate of the managers, I can scarcely call it an irregularity. But assuredly this manner of holding the poll to receive the votes, has infracted no plain rule of law or the principles of the constitution, to justify this Court to arrest the election, and eject the incumbent from his office.

The motion is therefore dismissed.

BUTLER, EARLE, and EVANS, JJ., concurred.

Graham, for the motion. *Mr.* ——, contra.

See Cheves, 267; 2 Rich., 6. *An.*

(*a*) 5 Stat., 569. *An.*

(*b*) 6 Stat., 94, § 2. *An.*

IN THE COURT OF 3.

*498] *ALEX. HAMILTON *vs.* JAMES J. LANGLEY.
THE SAME *vs.* GEORGE C. MAYSON.

In an action on the case for slander in charging the plaintiff with perjury, the *colloquium* stated in the declaration set forth the trial of an indictment for a riot; the record produced on the trial was for a riot and assault; held, to be an immaterial variance.

So, a slight variance in the names of the defendants in the indictment, as set out in the declaration and contained in the record, may be cured by parol proof of the identity of the persons.

Before EARLE, J., at Edgefield, Fall Term, 1835.

These were both actions of slander, for similar words, spoken by both defendants of the plaintiff, charging him with having sworn a lie on the trial of an indictment. There was a verdict in the first case for the plaintiff for one dollar, and in the other for one hundred dollars, both being submitted at the same time, under the same argument and charge, and on the same evidence. Both parties appeal, and as the objections of the defendant apply to the pleading on a motion for a nonsuit, they will be first disposed of. The *colloquium* in the declaration set forth the trial of an indictment. The *State* vs. *John H. Robinson, Irvine Huchison, George C. Mayson and Philip Ogilsbee*, for riot. The indictment produced on the trial, with which the minutes of the former trial corresponded, was *The State* vs. *John H. Robinson, Irvine Huchison, Philip Oglibee and Conway Mayson*, riot and assault. It was proved that George C. Mayson, and Conway Mayson, and Philip Ogilsbee and Philip Ogilbee, are the same identical persons; but it was objected, on the motion for nonsuit, that the variance was fatal, and could not be supplied by parol. In the first place I came to the conclusion, after some deliberation, that the variance was immaterial. On this subject the cases are numerous, and not free from contradiction, and without undertaking to refer to them or collect them, I was of opinion that as an assault was an usual constituent ingredient of riot, and the greater necessarily includes the less, it was still an indictment for riot, although it embraced a count for an assault. In fact, the oath of the plaintiff which was alleged to be false, applied strictly to the charge of riot, and the defendants were convicted of riot. The variance in the names was also immaterial, and if otherwise, it was competent to cure the variance by proof of the identity of the persons. The old strictness on this subject is much abated, and since the case of *Briston & Wright*, the Courts seem in England to be always endeavoring to tie up the generality of the propositions (*a*) But the distinction between that and all similar cases and those under consideration, is that in the former the paper or record set out con-

(*a*) 2 Doug., 665. *An.*

stitutes the *plaintiff's cause of action, the gravamen of his case, the foundation of his injury. Here, on the contrary, it is mere [*499 inducement to the statement of the injury, the mere occasion in reference to which the slander was uttered, and the same strictness is not required. Indeed, I doubt the necessity of producing the record at all, and I think on principle, and that authority may be found, that the occasion of the taking of the oath alleged to be false, the trial, and all the *colloquium*, may be proved by parol.

I overruled the other objections to the declaration contained in the defendant's grounds. The fact was enough, that it was an indictment for riot, for that was sufficient to show that the Court had jurisdiction of the cases, and of course the power to administer the oath. In an indictment for perjury, the materiality of the oath is essential, but in a civil action it cannot be.(*a*) The presumption is, that what a witness swears is material, and if the defendant expects to avoid a recovery on that ground, he must show that the particular oath charged to be false, was on an immaterial point. How far it would avail him, I would not say. The jury found, as already stated, verdicts for plaintiff, and the plaintiff appeals on several grounds. As to the first, it is sufficient to say that there was no objection made to the defendant's going into the proof of the facts and circumstances on which they relied to create suspicion ; at least I remember no formal objection, and I have taken note of none. Second, I considered it competent for the defendant to impeach the oath of the plaintiff on any point he chose. Suppose he had not specified any point or particular at the time of the speaking, surely he might on trial show it false in any particular ; and if he does specify, I do not perceive he should be bound by it as by a technical rule of pleading. I need not remark further on the others. It is difficult to conceive how the juries could have come to results so different on the same evidence. The verdict for one dollar was surely too small, with the other there is no reason to be dissatisfied.

Defendant's grounds for a nonsuit.

1. Because there was a material and fatal variance between the record offered in evidence and that described in the declaration.

2. Because there was no allegation in the declaration that the Court in which the indictment was tried, had jurisdiction of the case or had power to administer an oath.

3. Because the declaration did not allege that the oath of the plaintiff had been taken on a point material to the issue.

Plaintiff's grounds for a new trial.

1. Because the Judge permitted evidence of the justification in fact under the "plea of the general issue," and on points in which the plaintiff's testimony had not been impeached by defendants, when speaking the slanderous words.

*2. Because his Honor charged that the proof of defendants militating against the oath of plaintiff, should necessarily reduce the damages. [*500

3. The verdicts were too small, and were inconsistent.

Curia, per O'NEALL, J. Upon the motion for a nonsuit, this Court concurs in opinion with Mr. Justice Earle, and principally for the rea-

(*b*) See 2 McM., 118. *An.*

sons which he has given. The rule stated by Starkie in his treatise on Evidence, (4th part, page 1603,) that where a fact is simply alleged without vouching any instrument, and the instrument is used as mere evidence, a variance will not be fatal if the substance of the allegation be proved, covers the point made by the defendant on the motion for a nonsuit, for a variance between the record set out and that offered in proof. The record was, it is true, particularly alleged, but still it was a mere allegation of the record, without vouching it, and as in substance it was made out, it was sufficient.

The Court of General Sessions is a Court of general jurisdiction,(*a*) and it was unnecessary to allege that it had jurisdiction of the indictment. So, too, it was unnecessary to state that the oath of the plaintiff was taken on a point material to the issue. As soon as it appeared from the declaration that the defendant's words applied to a legal swearing on the part of the plaintiff, it became in legal contemplation an imputation of perjury.

As to the first and second grounds of a new trial, the Judge's report explains away the first, and on the second we concur with him. Upon the third ground, I would remark that a question of damages is particularly for the jury, and it must be a manifest case of error upon which we would undertake to interfere. The opinion of the presiding Judge, that the damages found were too small, cannot help the plaintiff; for notwithstanding we are disposed to give effect to his opinion in all cases where it can be done, yet this is one of those cases in which he had not the means of saying that the verdict was against evidence. For the damages are more discretionary than otherwise with the jury.

The motions are dismissed.

JOHNSON and HARPER, JJ., concurred.

Wardlaw and *Wardlaw*, plaintiff's attorneys. *Griffin*, defendant's attorney.

(*a*) 2 McMul., 116. *An.*

See 2 Sp., 592; 2 Rich., 580. *An.*

IN THE COURT OF ERRORS.

*THE STATE, *ex relatione* I. H. COLEMAN *vs.* HART MAXCY, E. J. ARTHUR *et al.* [*501

The Act of 1836, in regard to vagrants, is held to be constitutional.

The powers conferred upon a Court of Justices by the Act of 1836, in regard to vagrants, is no violation of those parts of the Constitution which provide "that no man shall be deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land;" and that "the trial by jury, as heretofore used in this State, shall be forever inviolably preserved."

A proceeding for vagrancy under the Act of 1836, is not barred by a prosecution in the Court of Sessions for gaming.

Before EARLE, J., Columbia, at Chambers, 23d Nov., 1837.

The relator, under the Act of December, 1836, had been preceded against as a vagrant, on the following charge :(*a*)

"That the said I. H. Coleman has, within the last six months, within ten miles of the South Carolina College, kept or used a house as a house for gaming; and that the said I. H. Coleman, within the last six months, within ten miles of the South Carolina College, has aided or assisted in keeping or using a house as a house for gaming; and that the said I. H. Coleman has, within the last six months, kept a faro bank, or other device for gaming, within ten miles of the South Carolina College."

On the hearing before the justices and freeholders, on the 9th inst., he was convicted, and adjudged to be a vagrant. The record of the conviction states the acts charged in the same form. This proceeding was instituted on a requisition, in writing, signed thus: "John D. Edwards, Solicitor, by R. W. Singleton, acting Solicitor."

A motion was made before me, for a prohibition to the Court of Justices, &c., to restrain them from proceeding to enforce their sentence, on several grounds; mainly, as to the sufficiency of the information and conviction in point of form; the bar created by the pending of a prosecution for gaming, in the Court of Sessions; the jurisdiction of the Court, and the constitutionality of the Act of 1836. The several grounds of objection were deemed unavailing; and on full consideration, the motion for a prohibition was refused.

The relator giving notice of his intention to appeal, the Court was ordered to forbear proceeding, until the hearing of the appeal.

The appeal was heard in the Court of Errors, at Columbia, Dec., 1837.

Curia, per EARLE, J. In the argument here, several questions have been raised and discussed, on the regularity of the proceedings of the Court, and on the sufficiency of the information, warrant, and conviction, in point of form. These points I do not regard as properly presented for consideration, on a motion for prohibition. The proceedings before

(*a*) 6 Stat., 554. *Rep.*

the Justices are required to be returned to the Circuit Court, to be filed away of record there. The conviction being summary before an inferior and limited jurisdiction, *a motion will be in order, to quash it for any sufficient cause apparent on the face of the proceedings, either for irregularity or insufficiency. I do not perceive that there is any objection to either, that ought to prevail. If the same technical precision and accuracy were required in the proceedings before Justices, that are necessary in indictments, the administration of criminal justice would be rendered almost impracticable. The principal ground of objection lies at the root of the whole proceeding, and assumes that the Act of the Legislature of 1836, under which it has arisen, is in violation of those parts of the Constitution which provide "that no man shall be deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land," and that "the trial by jury, as heretofore used in this State, shall be forever inviolably preserved."

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This presents a very grave question, and the discussion of it, if equal to its importance, might occupy a great deal of time, and would afford employment for the greatest ability.

The 2d sect. of the 9th article of our State Constitution, part of which I have quoted, is drawn, as every one knows, from Magna Charta, adopted under King John, and subsequently confirmed by other princes, and lastly by Edward II. (*a*) In the construction of the words "law of the land," it seems to be held in England, that the expression embraces the common law and the statute law down to the end of Edward 2d's reign. By analogy, it has been held in this State, that the same terms used in our Constitution, must embrace the common law as then adopted here, and the statutes of Great Britain, and of this State, made of force, and in operation at that time. So the 6th sect. relative to the trial by jury, as heretofore used, taken in connection with the 2d, which secures trial by peers, would seem to imply that the institution of trial by jury was to be preserved and enjoyed according to the law of the land then known and in operation, I think it may well be questioned, whether the 6th article was intended to impose any further restriction on the Legislature, or to secure any larger right to the citizen, than the 2d section intended to secure. It cannot be supposed that inconsistent provisions on the same subject would be inserted in an instrument so carefully drawn and so fully considered.

The 2d section had already secured life, liberty and property, except by the judgment of peers, or by the law of the land. When the 6th section declares that the trial by jury, as heretofore used, shall be preserved, I suppose it meant only that it should continue to be used except where it was superceded or dispensed with by the "law of the land," under the former section. In the construction of these words, it has been held, both in England and here, that they do not mean merely the common law and statutes, but that they recognize and embrace the proceedings of the various courts of ascertained jurisdiction, known to the law, "as the several matters determinable, summarily, by one or more

(*a*) 3 Dess. Eq., 478; 2 Bail., 677; 1 Bay., 391; 1 Bur., 471; 2 Sp., 767; 5 Rich., 107, 115; 10 Rich., 440. *Rep.*

justices of the peace," says *Dr. Sullivan, (2 Lect., 262;) and [*503
Waties' Justice, in Zylstra's case,(*a*) enumerating the exceptions to the trial *per pares*, includes "the courts of justices of the peace, because they are sanctioned by long use, and it may be said, by a popular adoption of them," and for other considerations. A freeman, therefore, is not to be deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land; that is to say, by the judgment of some competent judicial tribunal, known to the law, and proceeding upon some rule of action prescribed by the Legislature, according to the accustomed forms, or as Lord Coke has it "by due process of law."

I cannot but think it would be too rigid a construction of the 6th section, concerning the trial by jury, to say that the Legislature can, in no case, in all time to come, confer upon such courts as have been referred to, as exceptions to trial *per pares*, any jurisdiction, in matters civil or criminal, which they had not at the adoption of the Constitution. I think it more liberal and sensible to construe the 6th in connection with the 2d section. That fundamental instrument should not be construed like a deed conveying an estate or granting a power. It is a political regulation, and should receive such interpretation as to secure the peace and good order of society, so far as is compatible with the liberty of the citizen.

We are led to inquire how stood the subject of vagrancy, at that time. Idle and disorderly persons, vagrants, are terms often occurring in the old statutes. They have been from time immemorial, in England, subject to the summary jurisdiction of justices of the peace. (Com. Dig. Justices; Burn's Justice, Vagrants.) And by the Stat. 17 Geo. 2, ch. 5, no less than seventeen different classes or descriptions of persons are declared to be vagrants, who may be apprehended, tried in a summary manner, and on conviction, be imprisoned and whipped.

Our Act of 1787, (*b*) much less rigorous in its provisions, appears, nevertheless, to have been modelled on that of George II. It enumerates the various descriptions of persons who shall be deemed vagrants; and it is obvious that its penalties are directed against all those idle and disorderly persons, who either have no visible means of living, or who pursue such means of gaining a livelihood as are dishonest, or subversive of the peace and good order of society. Among these are "all who acquire a livelihood by gambling or horse-racing, without any other visible means." The mode of proceeding is prescribed; and on conviction, the defendant is required to give security for good behaviour for twelve months, and on failure may be committed A fair copy of the proceedings is required to be returned to the next Court, to be filed of record; and if the Court shall not think fit to discharge the offender, he may be sold, or whipped, or put to hard labor.

The Act of 1836, under which this conviction has been made, enacts that if any person shall, within ten miles of the South Carolina College, keep or use any house for gaming, or keep or use any faro bank, or other *device for gaming, he shall be proceeded against as a vagrant, [*504
and on conviction, shall be deemed such, and be required to give security for good behaviour, and that he will not offend against the Act

(*a*) 1 Bay., 389. *An.* (*b*) 5 Stat., 41. *An.*

for three years; and in default, to be proceeded against as in other cases of vagrancy. And it is urged that the Legislature cannot, at pleasure, make vagrants, by Act, of any class of persons, that whim or caprice may prompt; and this may be conceded without affecting the argument. Though, if vagrancy be in itself an offence, it would not be easy to prescribe a limit to the power of the Legislature, to subject any class of the vicious, idle and dangerous to its penalties. But in the Act of 1836, they have not departed from the enumerated classes in the Act of 1787, viz.:— all those who gain their livelihood by gambling or horse-racing, having no other means. In the Act of 1836, a person is subjected to the penalties of the former Act, who gains his living, in part, by keeping a gambling house or faro bank in the vicinity of the College, without inquiry as to his other means of living. And it would seem, that the danger to the institution here, or the prejudice to the community at large, is just the same, whether the keeper of a gambling house or faro bank has other means of gaining a livelihood, or not, admitting that to be a vicious and dangerous one, within the scope of the Act of 1787.

It is objected that it is beyond the power of the Legislature to constitute this new class of vagrants, and authorize them to be proceeded against as such, under the provisions of the Act of 1787, because it deprives a man of his liberty without a trial by his peers; because the trial by jury is not preserved as heretofore used. I consider the Acts against vagrants, as they are embraced in those of 1787 and 1836, as highly beneficial; and if carefully and rigidly enforced, that they would prevent much of the crime that is perpetrated in the country. If, however, they are violations of the constitutional rights of the citizen, I should be very unwilling to lend the aid of this court to enforce them. "The maxim then, is," says Dr. Sullivan, "that no man shall be taken and committed to prison, but *per judicium parium, vel per legem terrae.*" 2 vol. Lect. 265. According to the interpretation which, I have endeavored to show, has been put upon those words, even in connection with the 6th Section of the 9th Article, concerning trial by jury as heretofore used, can it be said, that a person charged under either Act, and carried before the court of justices for vagrancy, is taken and imprisoned otherwise than by the law of the land, or due process of law? I cannot come to that conclusion; the court which tries him is known to be the law of the land; has been, from time immemorial, part of the law of the land; and its whole proceedings are by due process of law ascertained and established.

Here we naturally come to inquire, what are the true ends and purposes *505] of the Acts against vagrants? I think they have been imperfectly* understood, at least so far as relates to the jurisdiction and proceedings of the magistrates. I think it is not the main purpose of those Acts, to proceed by way of punishing for an offence; for vagrancy in itself, can hardly be deemed a distinct offence. The Acts seem rather intended to afford some adequate security to the public, against the danger to be apprehended from the several classes of persons enumerated, all of whom, from their want of honest employment, or from their vicious pursuits, may well be considered as dangerous to society. The proceeding at first, therefore, is merely inquisitorial, to ascertain the means of living, and the mode of life, of the suspected person; and if it be found that he has no visible means of living, or pursues a vicious and dishonest course

of life, then that the orderly and virtuous portion of the community shall have some security against the depredations to be apprehended from such a character. This security is afforded by a recognizance for good behaviour, for twelve months, under the Act of 1787, and for three years, under the Act of 1836; or by confinement until the next Court, to which, also, the proceedings are required to be returned. The office of the justices here terminates.

In case the bond is given for good behaviour, the object to be attained is accomplished; the security against apprehended mischief is afforded. If it be not given, the suspected person is turned over to the Court of Sessions. That Court, on looking into the proceedings and evidence, may discharge, if they are insufficient. Under the Act of 1836, the grave question would arise, whether, if the Court should not see fit to discharge, it would be authorized to sell the services of the persons charged, or to order him to be whipped, or to be put to hard labor. These are the alternatives under the Act of 1787; and I think they have been generally practised on, although the same constitutional scruples have been often urged. Yet, it would seem not to be a violation of the right of trial by jury as heretofore used, for the Court, as before remarked, was a part of the law of the land, and the trial there, was always without jury. The question, whether, under the Act of 1836, the Court could proceed to act on the conviction of the justices, without further trial, does not necessarily arise here, and no opinion will be expressed by the Court. It is a question which the Circuit Court must first decide for itself.

Supposing, however, under either Act, that the Court should feel itself fettered by the constitutional objection, or should not be disposed to adopt the rigorous alternatives provided in case the defendant has not given the security, there is another course which may be pursued by the Court, in virtue of its general powers of criminal jurisdiction. The Court being in possession of all the evidence taken before the justices, if it should not see fit to discharge the offender, may order him to be indicted there for such offence as the evidence shows him to have committed, and bind him over for *his appearance, or commit him for trial. If no distinct offence be exhibited, the Court may still, [*506 if the evidence warrant it, require him, as a measure of precaution, to give security for his good behaviour, and on failure, commit him as a suspected person. If this view be correct, the Acts are divested of those features which are apt to be regarded as rigorous and oppressive. It follows, I think, that a proceeding for vagrancy, would not be barred by a prosecution pending in the Court of Sessions for gaming. If the security is given to the justices, there is an end of the proceeding; for it is clear, that it is not meant as a punishment for the offence of gaming. The Act of 1836, seems to contemplate a prosecution for that offence separately, by making a provision for increasing the costs.

The Court is of opinion that the Judge below was right to refuse the prohibition; and the motion here, to reverse his decision, is dismissed.

EVANS, RICHARDSON, JOHNSON and JOHNSTON, concurred.

GANTT, O'NEALL and BUTLER, dissenting.

Black, for the motion. *Edward*, Solicitor, contra.

See Sup., 72; *Commissioners of New Town Cut* vs. *Seabrook*, 2 Strob., 564; *Crosby* vs. *Warren*, 1 Rich., 385, 390. *An.*

REPORTS OF CASES AT LAW,

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

AND

COURT OF ERRORS

OF

SOUTH CAROLINA,

FROM NOVEMBER, 1841, TO MAY, 1842, BOTH INCLUSIVE.

[WITH AN APPENDIX CONTAINING SOME EARLIER CASES.]

BY J. J. M'MULLAN,

STATE REPORTER.

VOLUME II. SECOND EDITION.

CHARLESTON, S. C.
M'CARTER & DAWSON, 116 MEETING STREET.
1859.

[IN THE FIRST EDITION.]

TO THE PUBLIC.

This volume of Law Reports closes my labors as State Reporter. How far I have discharged my duty, to the satisfaction of the State, I am unable to determine. But if I have failed, in any one particular, to do my duty, it was from causes over which I had no control, or from a want of judgment in the performance of them.

I have to ask, again, the indulgence of the profession, for the great delay in the appearance of this volume. It has been delayed far beyond what I had intended; but it was not from any wilful neglect, that it has been delayed, but rather from such an indisposition, as would not allow me to perform labor of the kind that was necessary to its completion. I trust that no serious loss has been occasioned by its non-appearance, and that, though late in its appearance, it will come in such a shape as to be acceptable. A few of the omitted cases, promised, are subjoined. And should the health of the undersigned, and a sufficient inducement be offered—he will endeavor, (although not now in the service of the State) to collect and present another volume of Law Cases, omitted by previous Reporters, since 1830. Perhaps a few Equity Cases may also be given.

J. J. M'MULLAN.

Lancaster C. H., October 1, 1843.

CASES AT LAW

ARGUED AND DETERMINED IN THE

LAW COURT OF APPEALS OF SOUTH CAROLINA.

Columbia, December, 1841.

JUDGES PRESENT DURING THE TERM.

HON. RICHARD GANTT, (*a*)
" JOHN S. RICHARDSON,
" JOHN BOLTON O'NEALL,
" JOSIAH J. EVANS,
HON. BAYLIS J. EARLE,
" ANDREW PICKENS BUTLER.
" DAVID LEWIS WARDLAW. (*b*)

THE STATE OF SOUTH CAROLINA *vs.* D. G. WYLIE, SHERIFF, ET AL.

1. The Act of 1839, regulating the office and duties of sheriffs of this State, and dispensing with the return of "*nulla bona*" heretofore required against sheriffs, before commencing actions on their official bonds against the securities, does not do away the necessity *of the return of "*nulla bona*" where the sheriff was elected and gave bond before the passage of the Act of 1839. [*2
2. The Act of 1839 is prospective, and applies only to those sheriffs who have been elected and given bond since its passage.
3. Where the sheriff, making the return of executions in his office, to the clerk of the Court, previous to each Court, as required by law, omits to make the proper return, he will not be permitted to make it subsequently, "*nunc pro tunc.*"

Before GANTT, J., at Fairfield, Fall Term, 1841; who reports the following as the facts of this case.

This was an action of debt, brought on the official bond given by the defendant, David Wylie, the Sheriff of Fairfield district, and the other defendants, as his sureties.

On the part of the plaintiff, the following testimony was offered:

1. A certified copy of the official bond given by said Wylie, and the other defendants, as his sureties, dated October, 1836.

(*a*) Resigned during the Term.

(*b*) Elected during the Term, in the place of Hon. R. GANTT, resigned. He qualified, and took his seat with the Court, as one of the Appeal Judges. [All the cases of this term, in which his concurrence or dissent does not appear, were decided before he took his seat: the cases not being reported in the order of the time of decision. *An.*]

2. Sundry unsatisfied writs of *fieri facias* against said Wylie, some of which were lodged in the office of the Coroner of Fairfield district, in July, 1840, and others lodged in the office of the present Sheriff of Fairfield district, in November, 1840.

3 The book of returns made by the present Sheriff of Fairfield, according to the provisions of the Act of 1827, entitled "An Act to prevent the frequent renewals of executions," marked on the outside as having been filed in the clerk's office, in February, 1841. Three of the executions against David G. Wylie, and which are still unsatisfied, are contained in this book of returns; but no entry is made as to the state or condition of said executions, nor any reason given why the money had not been made. In the progress of the trial, plaintiff's counsel moved for leave to amend these returns, by permitting the Sheriff to fill the blank, *nunc pro tunc*, according to the facts then existing; or for leave to examine him as a witness, in regard to those facts.

Sundry writs of *capias ad satisfaciendum*, against said Wylie, upon which he was arrested on the 7th April, 1841.

The petition of said Wylie, for the benefit of the prison bounds' Act, together with the schedule and assignment *of the whole of his estate and effects, was also given in evidence. *3]

Plaintiff was prepared to prove breaches of the condition of the bond; but the defendant's counsel moved for a nonsuit, on the ground, that there was no return of *nulla bona* on any *fi. fa.* against said Wylie, before the commencement of this suit; and the motion was granted by the Court.

From the order of nonsuit, the plaintiff appealed, on the grounds:

1. Because a return of *nulla bona* on a *fi. fa.* against said David G. Wylie, was not necessary to the maintenance of this suit.

2. Because there was sufficient return of final process against said David G. Wylie, according to the Act of Assembly of 1827, to sustain this action; and if that return was defective, leave ought to have been granted to amend the same.

3. Because there was sufficient evidence of the insolvency of said David G. Wylie, for the maintenance of the above suit against his sureties.

McCall, for the motion. Cited the Act of 1839, and contended that by this Act the Act of 1795 was repealed, and the return of *nulla bona* was dispensed with. The words "the bonds may be sued at any time," makes no distinction between principals or sureties. Cited Bac Ab. Tit. Stat. Letter F. The later intention of the Legislature must prevail. He insisted that where statutes are inconsistant, the first gives place to the last; 4 Sec. Act 1839; 7 Stat. at Large, 26. The return of *nulla bona* is a mere matter of evidence, to be required by the Court, before it can proceed to judgment against the sureties. The Act of 1839 repeals that provision. The Act dispensing with proof by a subscribing witness, is analogous to this, and yet it never has been held, that on a contract, before that Act, it could not be proved by proof of handwriting.

At the passage of the Act of 1839, defendants had incurred no liability, and there was no suit brought; Brev. 24–60; 6 Bac. 383, Stat. Letter F. 50; *pari materia*, 5 T. R. 16.

*The Act of 1839, regulating returns, dispenses with *nulla bona* returns. *4]

As to the amendment of the return, cited 1 Taunt. 23, 221; 3 Mass. Rep. 230; 2 Stra. 1123; Ban. 446; Repeal of Stat.; 1 McMull. 69, 338; Dud. 165; 3 Hill, 190; Bail. Eq. Rep. 208.

Woodward, for the motion, also cited, 2 Faust. 8; Act 95, Act 27, 55, do. 29—21—*ib.* 1839; 7 Stat. at L. 26. Mr. Woodward said, the Act of 1795 did not re-

quire positive evidence of insolvency; a mere *prima facie* showing, as a return of *nulla bona*, is sufficient. If the insolvency of the sheriff can be proved by the party, or that of the principal, it is higher evidence, and ought to be allowed in lieu of *nulla bona*. If the return of *nulla bona* is merely of the *lex fori*, then, indeed, the Act of 1839 is the rule. When the return of the sheriff is to operate as evidence, then his return may be amended *nunc pro tunc*. There is a distinction between a proviso and an exception; the former qualifies, the latter takes something out of it.

Mr. W. contended, that looking at the Act of 1795, as he had suggested, and the Act of 1829 repealed it; it operates upon all the officers, and therefore the rule must be the same as to all. He cited here, 9 L. Lib. 707, Marg. page. In construing statutes, *pari materia*, where, in some it is omitted, and in others it is inserted, the omission is to be regarded as designed.

Mr. Clarke, contra, contended that the Act of 1795 was the rule that must govern this case. The sheriff's bond was given in 1836. The words, "shall sue at all times," are in the Act of '95, as well as in the Act of '29. He contended that there was no repugnancy between the Acts of '95 and '39, although it does omit the *nulla bona* return. If it had been part of the bond, he admits it would have been repealed; but as it is only a legal regulation outside of the bond, it is not repealed. The Act of '39 cannot have effect, for it is a material part of the contract. Cited 1 Kent's Com. 454, Act, 27, 65. The return does not conform to it. The action was brought 26th March, 1841, and Wylie, the sheriff, applied for his discharge under the insolvent debtors' Act, in April, 1841. His assignment *was dated 13th April, 1841. This was subsequent to the commencement of the action. [*5

Curia, per WARDLAW, J. "An Act concerning the office of Sheriff," passed 1795, (5 Stat. at Large, 257,) directs that every person elected to the office of Sheriff, shall "enter into a bond drawn payable to the Treasurers of the State for the time being, and their successors, conditioned for the due and faithful discharge of the duties of the said office:" that the sureties shall, severally, be liable, "each one for his equal part of the whole sum" of the penalty, and no more; and the third section is as follows: "That the bonds to be given by the Sheriffs, according to this Act, and to be deposited in the treasury, may at all times be sued for by the public, or any private person who shall or may think themselves aggrieved by any misconduct of any Sheriff; for which purpose, the Treasurers for the time being, and each of them, upon application at the treasury office, shall deliver to any person applying therefor, and paying the fees for doing the same, an exact and certified copy of any Sheriff's bond there deposited; which copy, so certified, shall be good and sufficient evidence, in all the Courts of this State, in any suits so to be instituted: *provided, nevertheless*, it shall not be lawful for any person who shall conceive himself aggrieved by any Sheriff, to commence any action against the security hereby required to be given, until a return of *nulla bona* shall have been made on some execution to be issued against the said Sheriff, either at the suit of the person aggrieved, or some other person." "An Act concerning the bonds of public officers," passed 1829, (6 Stat. at Large, 383,) prescribes the form of a bond to be given by every public officer from whom bond is required, provides for the distribution of blanks, exacts from all an oath, in nearly the same words which a section of the Act of 1795 employs, in prescribing an additional condition of a Sheriff's bond, and the 5th section is as follows: "The bond of any public officer in this State may, at all times, be sued on by the public, any corporation, or private person, aggrieved by any misconduct of any such public officer:

for which purpose, the Treasurers for the time being shall deliver to any *6] person applying therefor, and paying *the fees for doing the same, an exact and certified copy of the bond of such public officer there deposited; which copy, so certified, shall be good and sufficient evidence in all suits to be instituted in any Courts of the State." "An Act concerning the office, duties and liabilities of Sheriffs," passed 1839, (Pamph. p. 26,) in the 3rd section, directs, that the bonds of the Sheriffs shall be given in certain penalties, and the 4th section is as follows: "Every surety to the bond of a Sheriff shall be liable for the whole penal sum therein expressed; nor shall any return of *nulla bona*, on any execution against the sheriff, be henceforth necessary before legal resort may be had against his sureties, or any of them; Provided, that there shall be liability to contribution among the sureties aforesaid, as in cases of joint suretyship."

Upon the first ground of appeal, it has been contended that the return of *nulla bona* required by the Act of 1795, is either repugnant to the Act of 1829, or, being expressly made thenceforth unnecessary by the Act of 1839, is immaterial in suits, even upon bonds of date prior to the latter Act. The repugnancy to the Act of 1829, has been pressed with great force; and, as the Court is divided, and the argument has been strong, the subject will be carefully considered. The requisition of the return of *nulla bona* having, in the Act of 1795, been made in the form of a proviso, the argument has been, that a proviso is a qualification of a previous rule; that the rule admitted suits "at all times," and the proviso restraining the commencement of a suit against the sureties, "until a return of *nulla bona* shall have been made," is a special qualification of the rule as to the time when suits may be commenced; and the re-enactment of the rule in 1829, without the proviso, is a repeal of the proviso, inasmuch as the qualification provided would be inconsistent with the rule re-enacted without qualification.

The meaning of the Legislature, however, is not always to be obtained by an exact attention to the form of its enactment. A proviso may be a qualification of a rule, but under a "*provided, nevertheless,*"(*a*) may be found sometimes a proviso, sometimes an exception, sometimes the exclusion of an inference, and sometimes an independent provision.

*7] *Where there is a substantive expression of the legislative will, it will be influential, even although the words conveying it are seemingly dependent upon others that are afterwards repealed, or enacted in a different form. The main purpose of the section of the Act of 1795, which has been quoted, seems to have been to allow all persons aggrieved, the use of the names of the public officers, to whom the bonds of Sheriffs were to be payable, and to facilitate the proof in actions upon those bonds; as the 5th section of the Act of 1829 was intended, after a change in the form of the bonds, to allow the use of the name of the State, and to extend to the bonds of all public officers the facilities before provided, as to Sheriff's bonds. But the "provided nevertheless," &c., in the Act of 1795, is no qualification of a previous rule; it is, in effect, an enactment, that in a suit upon a Sheriff's bond, no recovery should be had against a surety, unless, before the commencement of the suit, a return of *nulla bona* had been made against the Sheriff. Instead of standing, in

(*a*) Opinion of Wardlaw, J., in *Mitchell* vs. *Bogan*, 11 Rich. *An.*

form, as independent as it is in substance, this enactment is, by a verbal connexion, appended to the section whose main purpose is before indicated; but a strict adherence to the words would give us an inadequate idea of the meaning. "It shall not be lawful to commence any action until a return," &c. Was the Treasurer to inquire as to the return, before giving a copy of the bond? Was the unlawfulness of commencing the action to be otherwise punished than by the failure of the action? The provision appended related to the nature of the security's liability, not to the mode in which persons aggrieved should obtain redress; and when the Act of 1829 prescribed the form of proceeding, and proof as to the bonds of all public officers, the nature of the surety's liability, in case of a Sheriff's bond, was no more connected with the subject under consideration, nor more, probably, in contemplation of the Legislature, than was that other provision of the Act of 1795, peculiar to a Sheriff's surety, which limited the extent of his liability to an equal share of the bond. Under this view of the Act of 1829, the regulation of 1795, as to the nature of the surety's liability, was, in 1836, (when the bond sued on in the case before us, wa executed,) a part of *the contract; and to change the collateral obli- [*8
gation thus assumed by the surety, in the ordinary responsibility of a co-obligor, would be like converting an endorser into a joint and several maker. It is not to be lightly presumed that the Legislature in 1839, intended such a violation of contract; and by a just construction of what was then enacted, it seems that no retrospective operation, so as to embrace bonds before that time given, was intended. "Every surety to the bond of a Sheriff, shall be liable for the whole penal sum therein expressed," is a provision apparently general, embracing as well sureties to bonds before given, as those to bonds afterwards to be given; yet it has been conceded that this provision was intended to extend only to bonds thereafter to be given. By its juxtaposition, it is connected with the previous section, which speaks of bonds "to be given," and the injustice of extending it further, is too plain to be imputed to the Legislature. In the next member of the sentence, "nor shall any return of *nulla bona*, on any execution against the Sheriff, be henceforth necessary," the Sheriff meant, is the Sheriff before mentioned—the Sheriff hereafter to give bond —and the resort is permitted to his sureties. The "*provided*," &c., which follows is an exclusion of any inference against the right of compelling contribution, which relates only to the first member of the sentence, thereby making it more plain, that the intervening member is to operate at the same time, and on the same subjects. The whole 4th section of the Act of 1839, when analyzed, provides that neither the pre-existing regulation as to the extent of the surety's liability, nor the pre-existing regulation as to the nature of his liability, shall be applicable to bonds afterwards to be given, but that thence no inference shall arise unfavorable to the right of compelling contribution. Viewed in this light, the repeal of the pre-existing regulations, is a legislative exposition, declaring their force until that time. The Act of 1839 was intended to group together and digest all the statutory law as to the Sheriffs, and necessarily contained the repeal of regulations which, until that time, had existed, and then were thought inexpedient, but cannot well be supposed to contain a repetition of repeals before enacted, of regulations that had once been of force, but had been abrogated *ten years before the [*9

digest was proposed. It was then part of the contract made by the sureties before us, that they should not be liable to recovery, unless a return of *nulla bona* had been made against their principal, before action brought against them. No such return was made, and it could no more be supplied by an act *nunc pro tunc*, than could a demand, or any other matter, which is necessary to the right of action.

That the return of *nulla bona* was required only as evidence of insolvency, does not appear in the statute requiring it; there may be well conceived an advantage to the sureties, in having the return required, rather than proof of insolvency by reputation, or than even an assignment under the insolvent laws. Sufficient, however, it is to say, that the sureties had a right to insist upon their contract, and to require what the law had required as a condition, precedent to their liability. The motion is dismissed.

RICHARDSON, EVANS, EARLE, JJ., concurred.

O'NEALL, J., does not agree to the law laid down in this case.

BUTLER, J., absent.

See 5 Rich. 74. *An.*

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*10] *FELIX CROSSLIN *vs.* REED and REED. LAMAR and DANIEL *vs.* THE SAME. PETER LAMAR *vs.* THE SAME.(*a*)

1. The 8th sect. of the attachment Act, passed 1744, contains the provision "that if, at any time, within the year and day, any person shall appear as attorney, to the absent debtor, and will put in bail, to answer the action, and pay the condemnation," then the *attachment* shall be dissolved.
2. The 4th sect. of the Act of 1785, provides, "that all attachments shall be repleviable, by appearance, and putting in special bail, if, by the Court, ruled so to do."
3. These provisions constitute the law upon the subject. And the Act of 1839 has not altered the old law. *Vide*, 3 *McC.* 347. *Fife & Co.* vs. *Clarke, as illustrative of the law.*

Before O'NEALL, J., at Abbeville, Fall Term, 1841.

These were motions made before his Honor, Judge O'Neall, by the defendants, after having entered special bail before the clerks of the court; first, for leave to justify in open court; secondly, to dissolve the foreign attachments that had been levied by the sheriff. Both of which motions were granted.

The presiding Judge, after notice of appeal furnished the grounds of his decision, which is herewith subjoined; which, with the grounds of appeal, will render the opinion of the Court upon the case, satisfactory.

DECISION OF THE COURT.

The bail pieces, offered in these cases, have been objected to, because they have the condition "that if the defendants be condemned, in the action aforesaid, they shall pay the condemnation money, or surrender themselves prisoners, to the sheriff of the district, aforesaid," when, accord-

(*a*) S. C. again. *Infra* 346. *An.*

ing to the Act of 1839, it is contended, that it should have been, "that if the defendants be condemned, in the action aforesaid, they shall pay the condemnation money."(*a*) The Act of '39 provides: "and when the defendant, in cases of attachment, by the Court, ruled to put in special bail, before appearance, or otherwise, desiring to appear in that manner, shall in person, or by attorney, apply within the proper time, to put in bail, to answer the action and pay the condemnation, the clerk shall, thereupon, take such bail."

*The eighth section of the Act of 1744,(*b*) contains the provision, that "if at any time within the year and day, any person [*11 shall appear as attorney to the absent debtor, and will put in bail to answer the action, and pay the condemnation," then the attachment shall be dissolved. The fourth section of the Act of 1785, provides "that all attachments shall be repleviable by appearance, and putting in special bail, if by the Court ruled so to do."(*c*)

These provisions constitute the law on which the Court passed in *Fife & Co.* vs. *Clark*, 3 McCord, 347, and declared that a recognizance, conditioned to pay the condemnation and costs, "or surrender himself to the custody of the sheriff," was a compliance therewith. Here it ought to be remarked, that the condition to pay the condemnation money, covers the debt and costs, as well as the words "condemnation and costs," so that the bail pieces here, may be regarded as having the same condition as that in the case of *Fife & Co.* vs. *Clark*, and if the Act of '39 has not altered the old law, I am bound to conform to that decision.

I think it has not; for it speaks of being "ruled, to put in special bail or otherwise desiring to appear in that manner." Which shows that it was the purpose of the Legislature to retain the old security, and not introduce a new one. And although they speak of putting in "bail to answer the action, and pay the condemnation," it cannot be supposed, that they intended to alter the form of the bail piece. For where the Legislature use technical words, they must be understood in their settled legal sense. The terms "bail to answer the action, and pay condemnation," is a description of the bail piece required for special bail at common law.

But independent of this view, the law still stands, that "all attachments shall be repleviable by appearance, and putting in special bail, if, by the Court, ruled so to do." The meaning of the terms, "if, by the court ruled so to do," is nothing more than that the Court may order that the defendants shall have leave to appear on entering special bail. It is no objection to this, that the recognizance was executed before the motion. The Act of '39 simply directs, when the defendants are ruled to put in *special bail, that the clerk shall take such bail. [*12 He has taken the recognizance, and the bail are now before me, to justify. This is sufficient. Let the bail justify; and thereupon, the defendants may take their motion, to appear and dissolve the attachments.

The plaintiffs in the above cases, appeal, and will move to reverse the decision of the presiding Judge, on the following grounds:

1st. Because his Honor erred in holding that defendants, in foreign attachment, can appear by putting in special bail.

(*a*) 11 Stat. 76, § 21. *An.* (*b*) 3 Stat., 620. *An.*
(*c*) 7 Stat., 214. County Court Act. *An.*

2d. Because the only mode, in which defendants, in attachment, can be permitted to appear and dissolve the attachment, is by putting in bail, with the condition absolute, "to answer the action, and pay the condemnation."

3d. Because the proceeding was irregular and premature. For, conceding that defendants, in attachment, may appear by special bail, it is only when "ruled by the Court so to do." No such order was obtained.

4th. Because the motion of plaintiffs, to discontinue, as to Jane Reed, should have had precedence.

5th. Because the proceeding was otherwise irregular, and the decisions contrary to law.

Curia, per O'NEALL, J. I have reviewed my decision below, and have given to the argument of the defendants' counsel, that consideration, which the importance of a well argued legal question always demands. I have not been able to detect any error in the judgment below. The fourth ground of the motion is unconnected with the main question, it will be first disposed of. The application of the defendants, "to let the bail justify," was made before the motion for leave to discontinue, as to Mrs. Reed. It was, therefore, in point of order entitled to be first heard. As soon as the bail justified, the other order for the dissolution of the attachment, followed as matter of legal consequence. For, by law, as soon as special bail is put in, the attachment is dissolved. I have never been able to discover why the motion to discontinue as to Mrs. Reed, *13] should have been so zealously pressed, as a *privileged* *motion. If it was intended to obtain some legal, technical advantage, such as that Mrs. Reed had executed the bail piece, when she was not a party, *this* was reason enough, why the Court should have first permitted the bail to justify and dissolve the attachment. For the putting in bail made the proceeding *in rem*, a proceeding *in personam*, and the parties after it, stood upon the same footing, which they would have occupied, if they had been served with process. This was making the parties equal in Court. And after the attachment was dissolved, the plaintiffs could as well discontinue, as to Mrs. Reed, as before. The other grounds present the question which was decided on the circuit, and it might be sufficient to refer to the judgment below, for the reasons of the judgment *here;* but it may be well to add to them some other views, which the argument on the appeal and subsequent reflection have suggested. The terms bail, and special bail, used in the Act of '39, are terms well understood in their legal sense. The term bail, in its ordinary legal sense, is the delivery of the defendant to his securities, or keepers; as it is usually applied in this state, it is understood to mean, bail below, or bail to the Sheriff, which, by our act, has been turned into bail above, or bail to the action. The Act of '39, if it had stopped at "bail to answer the action," would have merely described, "bail below, or bail to the Sheriff," to obviate that they added the words, "and pay the condemnation," which was a definition of special bail, bail above, or bail to the action. The attachment of the defendant's goods, is to compel him to appear; and operates as bail to the Sheriff at common law, which is thus described in 3d Petersdorf's Abridgement, Title Bail, 97, marg. page. "The bail bond being conditioned for the defendant's appearance in Court, on the return day of the process, it is obvious, that in strictness of law, nothing can be a performance of the condition, but effecting what is technically called an appearance." The Legislature speak of "special bail before

appearance or otherwise, desiring to appear in that manner." This was describing the course of things which results from putting in bail to the action, and which was a common law appearance. Petersdorf describes it as follows: "This (that is a technical *appearance,) is effectuated, by putting in special bail to the action, or bail above, as they [*14 are in general, denominated in contradistinction to the bail below, or bail to the Sheriff." "Bail above, or special, may be described as persons who undertake generally, or in a sum, certain, that the defendant, if convicted, shall satisfy the plaintiff, or render himself to proper custody." It is plain, therefore, if the Legislature intended to use the words as legal, technical terms, that the bail pieces offered here have the proper condition. That they intended nothing new, is to be inferred from the fact, that they have merely put in one clause, provisions, which before existed in different acts. The case of *Fife & Co.* vs. *Clark*, had given construction to them, and settled the course of practice, and if the Legislature had intended to introduce a new rule, they would have made an entirely new provision. This was not done, and hence, I take it they intended the old construction should prevail. Independent, however, of that, I think that a bail piece, to answer the action and pay the condemnation, would have no greater legal effect, than one conditioned "to pay the condemnation money, or render himself prisoner to the Sheriff of the district aforesaid." If it be bail, it is plain that the party may be surrendered. It is called, "bail and special bail" in the Act; and in addition to this the bond is to be conditioned to answer the action. What is that, unless it be security for the party's appearance; and if he be not in the custody of his keepers, how can they undertake for his appearance? Again, the undertaking is to pay the condemnation. Cannot that be effected in two ways; 1st. By a payment in money, and 2d. By a render of the body? For while the body is in custody, the plaintiff can have no other satisfaction. It is at least, so long, to be regarded as the highest degree of payment. If he does not produce satisfaction, in fact, it may be, that the party may resort to other remedies. But the surrender of the body is the very utmost which the creditor can demand in payment. In *Young* vs. *Grey*, (Harp. 40,) the bond, I know, was conditioned, as these plaintiffs would have this to be, and yet in it, it was said, as settled law, "the bail might have surrendered their principal." This being the case, and the condition, demanded *by the [*15 plaintiffs having no greater legal effect than that used by the defendants, we should not be warranted in refusing the bail pieces. But I am entirely satisfied with the case of *Fife & Co.* vs. *Clark*, (3d McCord, 347.) It ruled correctly, that the form of the bail piece, required under the attachment Acts, should conform to the form required for bail above, or bail to the action; and the Act of '39, has not altered the law in this respect. The motion to reverse the decision below is dismissed.

EVANS and EARLE, JJ., concurred.

GANTT, J. I heard this case and concur in this opinion.

RICHARDSON, J., absent at the argument; but examined the opinion, and was satisfied with it.

Wilson and *Martin*, for the motion. *Wardlaw* and *Perrin*, contra.

See Act of 1843, 11 Stat., 256; 10 Rich., 59. *Am.*

CHANCY CHERRY, (bearer,) *vs.* JONATHAN FERGESON.

He who brings an action, on a written instrument, must set it out correctly; and that which he offers in evidence, must correspond with that which he has described. The name of the original payee, to a promissory note, is an essential part of the description. And a misrecital is fatal.

Before GANTT, J., Chester, Fall Term, 1841.

This was a summary process, tried before his Honor, Judge Gantt, at Chester, Fall Term, 1841, of which his Honor reports, as follows:

"S. Process on note of hand, purporting to be payable to J. Goodwright, or bearer, for the sum of $28 50, signed, Jonathan Fergeson, and *16] dated 24th June, 1840, on *which is a credit of $3, of the 11th December, 1840. A regular appearance had been entered for the defendant; on the case being called for trial, the counsel for the defendant relied on a variance between the original and copy process, in this, that the name of Fergeson was left out in the copy, the statement in the copy being, that "*Jonathan, the defendant, is indebted, &c.*"

"It was urged, also, that the person, to whom the note was made payable, was "Goodnight, and not Goodwright," as stated in the process; as the said Jonathan had appeared by attorney, and as the note was made payable to bearer, in which character the plaintiff sued out the process. I overruled the objection, and decreed for the plaintiff."

The defendant renewed his motion in the Appeal Court for a nonsuit, and to set aside the decree of his Honor, in this case, upon the ground:

That the note sued on, and the one offered in evidence, were different. The note sued on, purported to be made payable to "John Goodwright," and the note offered in evidence, was payable to one "John Goodnight." The *allegata and probata*, not corresponding, the Court should have sustained the defendant's motion for a nonsuit.

Curia, per EARLE, J. Whether the omission of the surname, of the defendant, was such a defect, as would avail him, in any form, it is immaterial to consider; when he appeared by attorney, and pleaded to the action, he waived the objection. The other ground of the motion is of more weight. He who brings his action, on a written instrument, must set it out correctly; and that which he offers in evidence, must correspond with that which he has described. It was necessary for the plaintiff to set out in his process the note, from which he derived his right of action, that the defendant might know the nature of the demand, to which he was called upon to answer. The name of the original payee was an essential part of the description. And a misrecital was fatal. Goodnight is a different name from Goodwright; and there was nothing to obviate, or remedy the variance between the process, and the proof. The *17] plaintiff, therefore, could not recover, and should have *been nonsuited. The decree for the plaintiff is set aside, and the motion for nonsuit is now granted.

RICHARDSON, O'NEALL, EVANS, BUTLER, JJ., concurred.

Wright and *McMullan*, for the motion. *Eaves* and *Thompson*, contra.

See 3 Rich., 69, 175; 1 Strob., 58. *An.*

JOHN M'LEAN *vs.* EX'ORS OF GREEN.

Defendants, executors of Dr. Green, late of Columbia, after advertising a sale of the negroes, belonging to the estate of their testator, to take place in the town of Columbia, on a certain day: on the day appointed by previous notice, proceeded to sell the negroes, at public out-cry; but before offering any of them for sale, announced publicly, and advertised the bystanders, that they did not warrant the soundness of the slaves; but the genuineness of the title. Held, that this was a sufficient notice to exonerate and exempt the executors, from a recovery against them, on an action for an implied warranty of soundness—also, held, that the *onus* did not lie on the defendants, to prove, whether the plaintiff heard, or was aware of the terms of the sale, or not.

Before O'NEALL, J., at Columbia, Spring Term, 1841.

Assumpsit on the implied warranty of soundness of a negro man, Edinburgh, sold at auction, by the defendants, with the other estate of Dr. Green, and purchased by the plaintiff. When the sale of the negroes was about to begin, and when the bidders were generally collected, the defendants caused it to be publicly announced, as part of the conditions of the sale, in regard to the negroes, that the title would be warranted, but not the soundness. Edinburgh, being bid off by the plaintiff, he complied with the terms of sale, and accepted a bill of sale from the defendants, warranting the title, but containing no warranty *of sound- [*18
ness. There was no proof on one side, or the other, whether the plaintiff was present, or absent, at the public announcement of the conditions of the sale. And it was contended for the plaintiff, that unless he were proved to be present, he was not bound by them.

The Court instructed the jury, that the refusal to warrant the soundness of the negroes, at the commencement of the sale, attached to each negro then sold; but that, any after representation of the soundness of this negro, would be a warranty.

The jury found for the defendants, and the plaintiff moved to set aside the verdict, on the ground of misdirection.

Curia, per EARLE, J. The sale, in this case, seems to have been an extensive one, and probably continued through several days. The printed advertisement of the sale, in the Gazette, was not produced, and, probably contained only a notice of the time of the sale, and the things to be sold, with, perhaps, the terms of credit, and the mode of securing payment. There were no written, or printed conditions of sale exhibited, or otherwise made known, on the day. It seems to follow, therefore, that the verbal declarations of the defendants, at the sale, constituted the conditions, by which they and the purchasers were to be bound. If there had been but a single negro sold, it is conceded on the part of the plaintiff, that the announcement of the defendants, that they warranted the title only, and not the soundness, would have been binding on the purchaser. But it is insisted, that each negro constituted a separate sale, and that the verbal condition announced, did not attach to every individual negro subsequently sold to different purchasers; and that bidders, not proved to have been present at the beginning of the sale, are not to be presumed to have known the condition thus announced. There is much difficulty in laying down a rule on this subject, that shall be free from objection. There is no doubt that, at an auction sale, in regard to the entry in writing, under the statute of frauds, to bind the

purchaser, each article constitutes a separate purchase, and requires a
*19] proper entry. But it would be extremely inconvenient, *and, it seems to me, without any corresponding advantage at an auction sale of fifty negroes, by the same person, on the same day, in pursuance of previous notice, to require, in the absence of printed, or written conditions, that the seller should announce, on offering each negro, the whole terms and conditions of sale. These may embrace many particulars, as, for instance, cash or credit, if the latter, for how long; the nature and form of the security; whether with, or without warranty, either of title, or soundness, or of both. Sales at auction should be accompanied with the most perfect openness and fairness. If the hour of sale is fixed by previous notice, the announcement of the conditions, verbally, before the hour, would not suffice. If made after the hour, or in case no hour be fixed, if made at the beginning of the sale, when the bidders may be supposed to be all assembled, and in such way, as to attract the attention, and reach the ears of the crowd; I can perceive no reason, why it should be repeated on the sale of each particular negro. In the case supposed, would a person to whom a negro had been knocked down, towards the end of the sale, on the same day, be allowed to disclaim the purchase, on the ground of being required to pay cash, when he supposed it was a sale on credit, not being present when the terms were announced; or on the ground of not being aware of the terms in any other particular? If printed or written conditions are exhibited in one place, only, the bidders are presumed to know them. If they are published aloud, at the beginning of the sale, why should not bidders be presumed to hear them? There are, always, terms of sale, and although not exhibited in writing, it is reasonable to suppose, that he who bids, has first inquired. The refusal to warrant the soundness of negroes was, here, only one of the conditions of the sale, of which the purchaser was as much bound to take notice, as that he would be required to pay part cash, or to give his note at sixty days, or his bond at twelve months; and if fairly and publicly announced, at the beginning of the sale, to the crowd of bidders, I think, would attach to the sale of each negro, in that gang, on that day. And such was the sale to the plaintiff, in this case. He did not prove that
*20] he was absent when the announcement *was made, or that he came to the place of sale afterwards, even if such proof could avail him. A majority of the Court thinks that the defendants are not required to prove that he was present.

This action is on the implied warranty; and it is material to bear in mind, that after the negro was bid off by the plaintiff, as the defendants allege under their refusal to warrant the soundness, he complied with the other terms of sale on his part, and accepted a bill of sale, from the defendants, warranting the title only. Now, it is true, that an express warranty of title does not exclude an implied warranty of soundness. (*a*) But when the question is, whether the warranty of soundness was part of the contract, the acceptance of such a bill of sale affords strong evidence, that the plaintiff was not ignorant of the refusal to warrant. Motion refused.

RICHARDSON, O'NEALL, EVANS, and BUTLER, JJ., concurred.

Black and *Arthur*, for the motion. *Gregg* and *De Saussure*, contra.

(*a*) Post., 333. *An.* See *Boinest* vs. *Leiguez*, 2 Rich., 464. *An.*

*Baker, Johnson & Co. *vs.* Abner Bushnell. [*21

The sureties to a prison bounds' bond are not liable for the costs, incurred in defeating the discharge of their principal, on his application under the prison bounds' Act. But costs may be taxed against the principal alone, in an issue to try the validity of his schedule.

Before O'Neall, J., at Edgefield, Fall Term, 1841.

The defendant applied for the benefit of the insolvent debtors' Act. The plaintiffs objected to his discharge, and filed a suggestion contesting his schedule.

After two trials at *nisi prius* and in the Court of Appeals, it was held that the prisoner was guilty of an escape, and could not, therefore, be discharged.

The plaintiffs claimed now to tax costs against the defendant on the issue disputing his schedule, and to recover the same against the defendant and his securities, on the prison bounds' bond. The presiding Judge ruled, that as the law gave no costs, none could be taxed; that they could not be recovered against the defendant's securities.

The plaintiffs appealed, on the ground of error in the Judge, and insisted that, by law, they had the right to tax their costs against the defendants.

Griffin & Burt, for the motion. Cited the Act of '88, and said, that by the authority of this Act, the Judge is directed to submit the issue to a jury. On a feigned issue, costs abide the verdict: cited Burr., 1021; 4 T. R., 402.

Carrol, contra. Cited 2 N. & M'C., 377; Act of '27; P., 55, fee bill.

Curia, per O'Neall, J. This Court is entirely satisfied, that the costs of the issue, in which it was held that the prisoner was guilty of an escape and could not therefore be discharged, could not be included in a verdict on the prison bounds' bond, against the defendant and his securities; and the case of *Leslie and Calhoun* vs. *Taggart, et al.*,(*a*) decided at this Term, may be referred to as a perfect analogous authority, on this very point. But it seems, that the plaintiffs' attorney merely intended to claim to be allowed to tax costs against the defendant alone; and after a full review of all the authorities, I think he is entitled *to do so. [*22
The 7th sec. of the prison bounds' Act, 5 Stat at Large, 80, enacts that "when the prisoner is accused of fraud, the Judge, or Justice, before whom the prisoner is brought, shall direct a jury to be empannelled and sworn to determine the fact." This makes the case a suit at law between the parties, on the question of fraud, or no fraud: and whether such a case arise by operation of law, or by the order of the Court, the rule is, I think, that the party, prevailing in the issue, is entitled to tax costs. In *Fabre* vs. *Zylstra*, 2d Bay, 148, the issue was made up under the insolvent debtors' Act, which does not direct the question of fraud to be tried by a jury. But, the Judges thought that it was the proper course. In allowing the issue, they did not make any order directing the costs to abide the event, which certainly would have been done, if the law had been otherwise. In *Denton* vs. *English*, 2 N. & M'C., 377; the the question, as to costs, arose on an appeal from the Ordinary and they

(*a*) Post., 71. *An.*

were not allowed; and that case has led to the confusion, on the matter of costs on feigned issues at law. When it is examined, it will be found, however, to rest on the peculiar features of the case before the Court. The verdict was not to be followed by a judgment of the court of law; it was to be returned to the Court, out of which the appeal came, and would there have its final effect; and hence, costs at law could not be awarded. Judge Colcock, who delivered the judgment, rested his opinion very much upon that view. For, he said, speaking of an issue from Chancery, as an illustration of the question then in hand. "The costs do not follow the verdict, as matter of course, but the finding of the jury is returned to the Court that ordered it, where the costs are discretionary." In a subsequent part of his opinion, he says, "where an issue feigned is ordered by the Court, and a verdict, the costs may be made to abide the event: but there, it is considered, as a case arising in Court, and stands on the footing of all other causes originating in the Court, and may be regulated by order." At first, I was disposed to take the view suggested by the closing words, which I have quoted, and to lay it down, that in all collateral issues made up by the order of the Court, or *23] by operation of law, the Court must direct the costs to *abide the event. And, in most cases, such a practice is very commendable. In issues, ordered by the Court, it ought always to be pursued.(a) It has, in such cases, the sanction of *Posey* vs. *Underwood*, 1 Hill, 266. But in issues which the parties are entitled to make up, as a matter of legal right, or when the Court neglects to make an order on a feigned issue, regulating the payment of costs, I am satisfied costs follow the result of the case so made. In attachment cases, where the return of the garnishee is discharged and an issue is made up, the Act subjects the party failing, to costs, *Westmoreland* vs. *Tippens*, 1st Bail., 514. In *Oldknow* vs. *Wainwright*, and *Rex* vs. *Foxcroft*, Burr., 1017, it was a feigned action under a rule, by consent, to try the right of election to the office of Town Clerk of Nottingham. By the order, directing the issue, costs were to abide the event. At page 1022, is found the judgment of Lord Mansfield, upon the question, whether the costs of the *quo warranto* and *mandamus*, out of which the feigned action arose, should be taxed against the defendant, as well as the costs of the feigned action. He said that "the costs on the civil side (arising on the issue only) *would, of course, abide its event, without needing any rule, or consent for that purpose*, (that point having been fully settled long before the making of the present consent rule.") In *Hoskins* vs. *Beckley*, 4 T. R. 4, there were feigned issues, and it was held that costs, as a matter of course, followed the event. But the Court intimated an opinion, that as feigned issues were only granted by leave of the Court, it would be prudent, in future, when they permitted such issues to be tried, to compel the parties, that the costs should be in the discretion of the Court. In *Herbert* vs. *Williamson*, 1 Wils., 324, it was ruled, that the costs followed the verdict on a feigned issue; and in it, the Judges use the strong expression "costs, *by law*, follow the verdict." They also draw the distinction between issues ordered from another Court, and issues arising at law; and assign the reason why costs at law are not allowed in the former.

(a) 6 Rich., 293, 323; Rich., 271. *An.*

They say "on an issue directed by Chancery, this Court gives no costs, but the finding of the jury is returned to Chancery and the costs there are in the discretion of Court, *because the statutes giving costs do not extend to that Court.*" In **Rex* vs. *Phillips*, Id., 260, the issue was to try the validity of a by-law, it was held that costs followed the [*24 judgment on the feigned issue. From this review of authority, I think it is clear, that the plaintiff in the issue, under the prison bounds' Act, is entitled to tax costs against the defendant, so far as the same may be provided for by the fee bill of 1827, (Acts of 1827, page 55.) The motion to reverse the decision below is dismissed; but the plaintiffs have leave to tax the costs of the issue against the defendant alone.

RICHARDSON, EVANS, EARLE and BUTLER, JJ., concurred.

See 10 Rich., 14; 6 Rich., 293, 323; 1 Strob., 116; 1 Rich., 26. *An.*

In *Rice* vs. *Gist*, 1 Strob., 82, all wagers were held unlawful. There seems then to be an impropriety in giving to an issue, for trial of a disputed fact, the form of an action to recover a wager,—which form is the technical *feigned issue*. A suggestion on one side, and traverse on the other, is easier, and violates no rule. *An.*

JOHN TERREL ET AL. *vs.* EVANDER EASTERLING.

Where a testator, by his last will, devised certain real estate to the plaintiffs, as trustees for his daughter, (therein named,) reserving the "sawing timber," growing thereon. It was held to be a good reservation, and sufficiently explicit to be understood.

Before EARLE, J., at Marlborough, Spring Term, 1841.

Whose report is as follows:—Trespass *quare clausum fregit*, and cutting and carrying away the plaintiff's timber. William Pledger made his last will and testament on 10th August, 1825, and died. He devised and bequeathed his whole real and personal estate to his wife, for life. After her death, he devised to John Terrel, and the other plaintiffs, "the following tracts of land; one tract, where Mr. Emanuel now lives, and the lower half of a tract lying between Herendenes Prong and Crooked Creek, next to Mr. Crossland's land, (*the sawing timber excepted;*") then *follows a bequest of negroes, "in trust, nevertheless, to permit my daughter, Mary Ann Emanuel, to use and enjoy the same, [*25 to her sole and separate use, &c., during the time of her natural life," with limitation over. He next devised to the same persons, "the upper half of the same tract, between Herendenes Prong and Crooked Creek, *the sawing timber excepted,*" with a bequest of negroes, in trust, for the use of his daughter, Caroline Williams, for life, with similar limitations. The testator, lastly, devised to the same persons, as follows: "all my lands, which I have not hereinbefore disposed of, also," &c.; then follows a bequest of negroes, "in trust, nevertheless, to permit my son, Philip Williams Pledger, to use and enjoy the same, during his natural life," &c., with limitations.

At the death of the testator, there was a saw mill, on a tract devised to Philip W Pledger, after the death of the widow, and which lay adjoining the tract, between Herendenes Prong and Crooked Creek, devised in equal portions to Mrs. Emanuel and Mrs. Williams; and out of which, the sawing timber was excepted. After the death of the tenant for life, Philip W. Pledger entered upon the saw mill tract, sold and conveyed it, together with the right to cut sawing timber, on the tract devised to Mrs. Emanuel. To perfect the title, there being judgments, he caused the Sheriff to levy on and sell the same tract, who also conveyed the right to cut sawing timber, as appurtenant thereto. Under these conveyances, the defendant entered, and claimed and exercised the right of cutting sawing timber, on the tract devised to Mrs. Emanuel, as appurtenant to the saw mill tract. For that trespass, this action was brought.

The persons appointed as trustees were also nominated, as executors, after the death of the widow; but they never qualified, nor otherwise took upon themselves the executive of the tracts; and never interfered in any manner with the management of the property. Mr. Emanuel and his wife were in possession of the lands, devised to her, at the date of the will, and have been so, ever since.

It will be perceived from this statement, that several questions arose; 1, as to the right claimed by the defendant to cut sawing timber, under the
*26] grant of Philip W. *Pledger; 2, as to the right of the plaintiffs to maintain this action.

In regard to the first, I consider the reservation, contained in the words, "sawing timber excepted," in the devise to the plaintiffs, in trust for Mrs. Emanuel, as incompatible with the enjoyments of those rights, that are inseparable from an estate in fee; repugnant to the nature of the estate devised, and therefore void; in the same manner as would be a condition, that the grantee should not commit waste, or take the profits, or that his wife should not have dower, and the like. I consider it, also, void for uncertainty, both as to the person in whose behalf it was made, and as the other lands to which it was to be appurtenant; and that this uncertainty could not be renewed by proof, *aliunde*. Supposing the objections not to be good, and that the reservation was valid, constituting a separate right or interest, independent of that of the devisee, I considered that it did not pass to Philip W. Pledger, under the general words, "all my land which I have not hereinbefore disposed of;" but that, as an inheritable right, it descended equally upon the heirs at law, of whom there were four, as a joint interest to be enjoyed like other rights of like kind, jointly, or to be jointly assigned; and that the defendant, as the assignee, or grantee of Philip W. Pledger, in regard to this right, took nothing.

In regard to the second question, as to the right of the plaintiff's trustees, to maintain this action, I was inclined to think they could not, and that the action should have been by Emanuel and wife; I thought it safer to refuse the motion for nonsuit, and instructed the jury to find for the plaintiffs, reserving the question, and with leave to the defendant, to enter a nonsuit, if the Court should be of opinion, that the action is not well brought by the present plaintiffs.

GROUNDS OF APPEAL.

1st. Because his Honor, Judge Earle, erred in deciding on the motion, in the Court below, that the plaintiffs, who are trustees by virtue of a clause of the will, giving to the *cestui que trust*, (who was in possession at the execution of the will, and continued in possession to the time of action,) *a life estate, and after her death, to the heirs of her body, with a still farther limitation, upon failure of issue, at her death, the plaintiffs never having had possession, exercised authority, or taken upon themselves any execution of the trust, could maintain an action for an injury to the possession. [*27

2d. Because the trust was executed, and the lands vested in the *cestui que trust*, who, alone, could maintain this action.

3d. That the *cestui que trust*, being in possession at the time of the execution of the will, and continuing in possession, exclusively, to time of this action, was a tenant for life, with the right of committing waste, and could, alone maintain an action for injury, merely to the possession.

4th. That the right, to cut saw-timber, was reserved by the testator, and conveyed by a subsequent clause of the will, to the said trustees, for the use and behoof of P. W. Pledger, for life, with a limitation over, under the name of land, and the said P. W. Pledger went into the use of the same, and sold to defendant's father, with the mill tract, to which it was intended to be, and was appurtenant, and was levied upon, and sold by the sheriff to defendant, to perfect the title, on a judgment obtained against the executrix of the will, on a debt due by testator, in his lifetime.

5th. That the right to cut saw-timber is a property, of the nature of an incorporeal hereditament, and is subject to a levy, and was properly conveyed by the sale of the sheriff, and the sale of Pledger, inasmuch as it was reserved by the testator, and sold upon a judgment, on a debt due by him, in his lifetime.

McQueen, for the motion. This case, may it please your Honors, was submitted to his Honor, upon legal questions, in the Court below, and was so tried, by supplying a few matters of fact on proof, and comes now before you upon the motion for a nonsuit.

The first ground, as to the plaintiffs' right to recover, presents two questions. 1st. Is the trust an executed trust, or is it executory? 2d. Suppose it to be executory, can the plaintiffs recover for an injury to the possession; they never having taken upon themselves the execution *of the trust, nor having been in possession: and the *cestui que trust*, in the actual possession, from the time of, and even before the making the will, to this time. [*28

The first question, then, may it please your Honors, I presume, will be decided mainly upon the face of the will, and the application of those principles, that have heretofore been established, in cases involving the same questions.

The lands here in question, with all the other lands, are loaned to the widow of testator, for life, and after her death, to be *divided*, in the following manner.

They are, then, given to John Terrel, and others, to wit: one tract, *where Mr. Emanuel now lives*, and the lower half of a tract, lying between Herendenes Prong and Crooked Creek, next to Mr. Crossland's land, (the sawing timber excepted.) "In trust, nevertheless, to permit my daughter, Mary Ann Emanuel, to use and enjoy the same, to her sole and separate use, without the control or interference of her husband, during the term of her natural life, and after her death, to convey the same to the heirs of her body; but should my said daughter die, leaving no heirs of her body, surviving her, then I give the said lands and negroes to the said," trustees, &c.

Let us see, then, what estate is this. I will not attempt here, to trace the doctrine of uses and trusts, but will only say, that when there is nothing farther to be done by the trustees, to vest the use of a freehold estate, it is an executed trust, and vests the legal estate. In 4 Kent's Commentaries, p. 303, this doctrine is found, "the *cestui que trust* is seized of the freehold, in contemplation of equity, the trust is regarded as the land, and the declaration of the trust is the disposition of the land." Again, on page 305, same volume on executed trusts, may be found as follows: "It is executed, either when the legal estate passes, as in a

conveyance to B., in trust, or for the use of C., or when only the equitable title passes, as in the case of A., conveying to B., to the use of C., in trust for D., the trust, in this last case, is executed in D., though he has not the legal estate, and all the cases decided in our own State sustain the position, that when nothing remains to be done by the trustees, to give the use, it is executed, and the estate
*29] *vests; and I have found no case decided, in our own Courts, or elsewhere, that does not declare the trust executed, when the trustees are not required to convey, or to receive, and pay out, or apply the profits and rents, to make repairs, or do some acts, in the management of the estate. In fact, in a large majority of the cases, the receipt and disbursement of the rents and profits, settle the question.

In this case, then, what single act is to be done by the trustees, to vest the use in the wife of Emanuel? She is in possession at the time of the date of the will, as appears on its face, and I see no authority clearly given to the trustees, even to enter on the premises. The lands, after the death of the widow, were to be divided, and it is not denied, that Mr. Emanuel was, at the time, in the possession of the portion given to the use of his wife, and has continued so ever since. The wife then has been in the enjoyment of the use given her, the trustees are to allow her that sole and separate use, they are to take no charge or notice of the rents and profits, to do no other act, that I can perceive, and how can the trust be executory? The estate, at her death, is to go to the heirs of her body, which, according to well-settled law now in this State, are her heirs generally. See the case of *Ramsey* vs. *Marsh*, 2 McCord, 252, also the case of *Jasper* vs. *Maxwell*, —— Equity, 357. In this last case, this doctrine is laid down, "Equity always compels the trustee to surrender the legal estate to the *cestui que trust*, unless the receipt of the profits by the trustee, is necessary to effectuate the intention of the creator of the trust:" also, see the case of *Hopkins* vs. *Ward*, 6 Munf. 41; and the case of *Cleary* vs. *McDowell, et al.*, Cheves, Rep. 140; and also the case of *Pringle and others, Trustees*, vs. *Allen*, 1 Hill's Chancery, 135.

But it may be said, the fact, that the will requires the trustees to convey to the heirs of the body of Mrs. Emanuel, will make it executory. This is not antecedent to the enjoyment of Mrs. Emanuel's life estate, and, in fact, cannot be of serious consideration, because no conveyance to them would be necessary; the law, by the statute of uses, conveys to them in such a case as this, and such a requi-
30] sition, requiring no more than the law does of itself, will be regarded as an useless expression. Then, the fact that the estate is not to be subject to the control or interference of the husband, will be relied upon; but in what way is he to be prohibited? The trustees are not to take the rents and profits; they are not to take the possession of the premises; they are not to lease the lands, and no express or implied right, that I can see given them, will allow them to do either, or, in fact, any other specific act of dominion. Suppose now the trustees were to assume the right of entering on the premises and turning off the *cestui que trust*, unless the husband would refrain from any, the least interference, or control, could they take the possession and lease out the premises, or could they hold the possession, under any implied right? I cannot think so; for, according to the case of *Jasper* vs. *Maxwell*, before cited, equity would compel them to surrender the sole and separate use and enjoyment to the wife, who is to render the trustees no account of the rents and profits, and, as a legal consequence, she must retain that enjoyment for her lifetime, and it is not certain indeed but that the testator intended by the words "convey the same to the heirs of her body" above alluded to, that she should convey the same to the heirs of her body; and if the will will bear that construction there is an end to this controversy.

By noticing the next succeeding clause of the will, we find the following, "but should my said daughter die leaving no heirs of her body, surviving her, then I give the said above land, and negroes, to the said John Terrel," and now what are we to infer from this, but that should she leave heirs at the time of her death, the whole estate is gone? I need not say to your Honors, that the terms, heirs, and heirs of her body, in this State, are, in legal contemplation, the same, and the law will construe the term and give it its legal meaning. If so, then this must be an estate in fee, or, at most, in fee for life, with remainder to other persons, and must be vested. If the testator did not so regard it why reconvey

it to the trustees? He had before given it to them, in trust, and if he had not intended that it should pass, upon her leaving heirs of her body, which the law construes for him to be heirs generally, *why again give it to the trustees? This seems to me to be a fair construction as can be made, harmonizing the [*31 words of the will and the law of the land, and I see no subsequent clause of the will to change that view. There is a part of the last clause of the will, which is in these words, viz.: "and in case both my daughters, Mary Ann and Caroline, should die without leaving any children surviving them, then I give the estate, hereinbefore left to their use, to such of my other children as may be then living, or their heirs," of which there may be some notice from the other side, because the word, children, is used; but it seems to me that this clause is in favor of my above position, rather than against it. It gives, if it be allowed to apply to the clause, making the first devise to Mrs. Emanuel, a life estate, at least, to her, and it is immaterial as to any other effect, and indeed the words "*children or their heirs*" seem to me in the very last of the clause to make it a fee simple, or at least a vested remainder in their children, or their heirs. And this clause puts the question at rest, on the right given in the first clause, in relation to Mrs. Emanuel, to her or the trustees, as it may be construed, at her death, to "convey the same to the heirs of her body," for it will pass at her death, by operation of the statute of uses, to the remainderman, whoever he may be.

I did not design, may it please your Honors, in the commencement of this, to spin out argument to this length; but rather to cite your Honors to authorities bearing on the points, and will leave the construction of the instrument without farther comment.

But should your Honors construe the instrument to create an executory trust, then the question presents itself, whether these plaintiffs can maintain this action for an injury solely to the possession.

The trustees never took upon themselves the execution of the trust, and never were in possession; but the *cestui que trust* has always had the occupancy, actual, and upon this ground I think the plaintiffs must surely fail.

The action of trespass *quare clausum fregit*, according to all authority, is for injury to the possession, and without the trustees taking on themselves the execution of the trust, they certainly can maintain no action; they cannot even *contend for a constructive possession, upon the possession of the *cestui que* [*32 *trust*, unless they had acted.

But suppose it may be said, that they were trustees as to this trust, the farther question arises, can they not, being in the actual possession, maintain this action where the *cestui que trust* is in the actual enjoyment and possession; can her possession be their possession? They had no right to the possession, they were not even to have charge of the rents and profits, no right of entry to take charge of the rents and profits, the *cestui que trust* was not even to account to them for them, but is exclusively entitled to them for her lifetime. Whose right, then, is affected and to be remedied in this form of action? Surely the person whose property is injured; suppose it had been corn growing in the field that was taken, would the trustees have to account for it; or would it merely affect the interest of the *cestui que trust?* Surely the latter. She would have a right to gather and use it, and render no account to the trustees. I can find no case authorizing one, even having a right to the premises, without actual possession, in himself, at the time, if the premises be occupied by any one, to bring an action of trespass *quare clausum fregit;* and believing that the bare suggestion of this view to your Honors will be sufficient will not dwell longer in argument upon it, but cite your Honors to the following cases: *Danford* vs. *Lowrey*, 3 Haywood, 68, which declares that trust estates are subject to the same rules as legal estates in every case, dower excepted; also the case in Cheves' Rep., 140, above referred to; also the case of *Amick* vs. *Frasier*, Dudley's Rep., 340; also a case, *Campbell* vs. *Arnold*, 1 Johnson's Rep., 511, where this doctrine is laid down "a lesser cannot maintain *trespass, quare clausum fregit*, against a stranger for cutting down and carrying away trees while there is a tenant in possession, the action can only be brought by the tenant in actual possession:" also a case, *Ward* vs. *M'Cauley*, 4 Term Rep., 489, is the following: A. having let his house, ready furnished, to B., cannot maintain trespass against the Sheriff for taking the furniture under an execution

against B., though notice were given that the goods belonged to A., because trespass is founded on a tort done to the possession, which was not in A. at the time; also a case, *Crosby* vs. *Wadsworth*, 6 East., 602, is the following: "one who *33] has contracted with the owner of a close for the purchase of a growing crop of grass, then for the purpose of being mown and made into hay, by the vendee, has such an exclusive possession of the close, though for a limited purpose, that he may maintain trespass, *quare clausum fregit*, against any person entering the close and taking the grass, even with the assent of the owner." I have rested so confidently on the above grounds, that I have confined my efforts in this case principally to them, and will not dwell lengthily on the other grounds of appeal. But should your Honors entertain different views from mine in relation to those grounds, then I submit, that the right of cutting saw-timber was a legal right, not incompatible with the nature of the conveyance. Suppose it were a fishery, or a right of way, would it be illegal or incompatible? I respectfully think not, and will only cite your Honors to 4 Kent's Commentaries, 310, part 6; there it is laid down, "Every estate and interest, not embraced in an express trust, and not otherwise disposed of, remains in or reverts to the person who created the trust." Then, if this is a right, it remained in the testator, and even if not disposed of in any subsequent clause of the will, there was no violation of the right of these plaintiffs in cutting it: they have nothing to complain of and cannot recover. In such case the parties in possession would certainly have to bring this action, or, at most, the persons having the legal right to immediate possession.

It escaped my notice at the time of the trial, or rather the decision on statements, that the Sheriff stated that he did not levy on the right of cutting saw-timber on Mrs. Emanuel's land, but included it in the deed; nor did I know it until the amendment of the report received from his Honor; but as to the levy, the report now settles the question. But I submit this view earnestly to your Honors, that the right of cutting the saw-timber was conveyed to the trustees for the use of P. W. Pledger, in the residuary clause of the will, by these words, "all my lands which I have not hereinbefore disposed of." Under the term lands, according to Judge Blackstone, incorporeal hereditaments may pass, and every interest, real; and the right of *cutting saw-timber having been reserved, the lands *34] adjoining the Mill tract, it seems to me, might pass under the general term used, if the defendant had have shown by parol that it was intended to be appurtenant by the testator, and has been so considered by all the parties interested ever since the testator's death. If your Honors will refer to the clause of the will giving to William Ellis Pledger a devise or bequest, you will find that the testator, then intending to give to him an interest, and rights in the realty, says "the following land;" and under the term land, he gives only the privilege of running his new mill race through such land as it then ran through, also the privilege of *cutting timber*, making a dam and raising the water, for a mill on another tract of land. And if this would amount to an ambiguity, then the defendant should have been allowed to prove by parol, and to have shown the understanding and intention of the testator, and of all the parties in interest afterwards, by which this right has been used by several who rented and indeed contracted for and used the mills, on the tract conveyed to P. W. Pledger.

If, then, the trust be executed in P. W. Pledger, and the right to cut saw-timber passed to him, his conveyance alone to the defendant is sufficient; or even if the trust be merely executory (as to all of which the arguments above, as to Mrs. Emanuel's part, will apply), yet, I take it, allowing the right to have passed to him to cut the timber, his conveyance of the land, and that right as *cestui que trust* alone, is sufficient to vest the right in the defendant for his lifetime; see the case Elliott vs *Armstrong*, 2 Blackf., 198 (found in 2 Equity Digest, 483), which says, that "the estate of a *cestui que trust* may be sold and conveyed by him, as well as any other estate." If this be law, and the *cestui que trust* had this right, he has parted from it for his lifetime. All of which is respectfully submitted.

J. W. McQUEEN.

12th May, 1841.

I will only add that Mrs. Emanuel has a numerous family of children now living.

*Dudley, *for Appellees.* The first ground of appeal assumes that the *cestui que trust*, being in possession when the trespass was committed, that the [*35 plaintiffs, who are the trustees, cannot maintain this action; and secondly, that the plaintiffs never took upon themselves the execution of the trust, or exercised any authority in relation to the trust estate. So that the first inquiry is, could the plaintiffs sue at all, as trustees? and the second is, if they could, would not the circumstance of the *cestui que trust* being in possession, prevent them from maintaining this action?

If the legal estate is in the trustees, they are the proper persons to sue for an injury to the land, unless precluded by the objection arising from the want of possession. In general, he who has the legal right should bring the action for an injury done to it. The ground taken, assumes that the trustees, in this case, had not the legal right, because they had never exercised any authority over the trust estate, or taken upon themselves the execution of the trust. The fact is not admitted, that the trustees ever have so disrobed themselves. They may not have been very diligent or watchful over the interests of their *cestui que trusts*, but they have been sufficiently so, to secure the very objects for which the trusts were created. They have suffered the property to remain in the hands of those who were to be benefitted by it, and have had no active agency in its management, simply because their interference was unnecessary. Their part was fully acted, in seeing that the *corpus* of the estate was not wasted. They have exercised no authority over it, because no attempt has been made to defeat the objects of the trust. Would an officer forfeit his commission because he did not "*charge bayonet*" in time of peace, when the foot of an enemy was not upon the land? Would a trustee be in a worse condition, because he did not ride over the trust estate and direct the farming operations, when the *cestui que trust* had no need whatever, for his services, and could do much better without, than with him? It is enough, as with the officer, that he comes forward when he is needed. In fact, the position taken by the appellant, when reduced to its simplest terms, is this—that a trustee loses his authority, because he does not seek opportunities to exercise it unnecessarily.

*It is submitted, that in point of law, a trustee to whom the legal estate [*36 is conveyed, remains the owner of it, until he renounces his authority by deed, whether he assumes the management of the trust estate or not. Cruise's Dig. Title, xxxii., c., 26, par. 2, 3, 4. To divest himself of the title he must disclaim by deed. This is the only evidence of his refusal to accept. The bare inactivity of a trustee cannot have that operation. This doctrine is again asserted, Cruise's Dig., Title xii., c. 4, par. 59.

It is not pretended that the plaintiffs in this case have so disclaimed. On the contrary, if such had been their wish or intention, the appellant might have availed himself of this part of his defence, viz.: procuring them to do so before the trial. With two exceptions, all the trustees reside within the limits of the district where this action was brought, and were accessible to the appellant, who might have consulted them as to their wishes in relation to a disclaimer. And as an additional circumstance, one of them was present at the trial, and witnessed its progress from the beginning. So much then, for the right of the plaintiffs to sue as trustees, disconnected with the question arising out of the possession.

As to this, which is the second inquiry arising out of the appellant's first ground of appeal, the appellee will endeavor to maintain, 1st. That the landlord may bring the action, unless the tenant has a right to the possession, in exclusion of all others. This is to be inferred from what is said in 1 Ch. Pl., 175, that without an exclusive interest, *case* is the proper remedy. By which, may be understood, that unless the tenant has an exclusive interest in the possession, he cannot maintain trespass; so, also, in 1 Ch. Pl., 174, it is said the action lies, however temporary the interest, if it be in exclusion of others. So that it would seem, that to deprive the landlord of the right to bring this action, he must have given to his tenant an exclusive interest in the possession. The true principle, perhaps, is this—that whenever the landlord has the right of property, and the right of immediate possession, he may maintain this action, in any case where the defendant is not in possession. It is laid down in 1 Ch. Pl., 179, that trespass cannot be main-

37] tained where the right of possession is in reversion, which justifies the inference, that it can be, where the right is not in reversion. The owner is always constructively in possession, where there is no one to dispute that right with him. This action was sustained, where there was an agent in possession, to prevent depredations, though the agent cultivated a part of it for himself. 3 McC., 424. This must have been, because the agent had no exclusive right, and that the owner could retake the possession whenever he pleased. That to maintain trespass, the plaintiff *must have possession,* is no less the law, in relation to actions brought for injuries to real, than to personal property. It has been often decided, that in actions of trespass, brought for injuries to personal property, it is sufficient, that the plaintiff has the *right of immediate possession.* In Archbold's Civil Pleadings, 22. it is said, that if an injury is done to a horse, whilst in possession of a bailee for hire, the owner must bring case, and not trespass; but that trespass lies where the horse was only lent. This must be, because the owner had the right to reduce the horse to possession at any time. To the same point is 8 Johns, Rep., 432, where it is said, that to maintain trespass the plaintiff must have such a right as entitles him to reduce the goods into possession at any time. So, also, is 1 Hill, 404. Thus far, the appellee has endeavored to demonstrate, that although a tenant may be in possession, where a trespass is committed upon land, yet the owner of the land may maintain this action, if the tenant has not such an interest in the premises as is inconsistent with the landlord's right of immediate possession. 2d. The appellee will attempt to show, that a *cestui que trust* in possession, is but a bare occupant under the trustee, and that his possession is not inconsistent with the right of immediate possession, which the plaintiff should have, in order to entitle him to maintain this action.

The authorities on this point are Jeremy on Equity, 27, where it is said, that the possession of the trustee is the possession of the *cestui que trust.* And in Esp., N. P., page 432, it is laid down, that the possession of the latter is the possession of the former. That this relation should be so intimate and amicable, results from the duties of the former, which consist in the defence of the land, the permanency

*38] *of the profits, and the execution of estates. Cruise Dig., Title xii., c. 4, par. 4. To perform these duties, it is necessary that the trustee should have the power at all times to enter upon the estate, for the protection of the interest of the *cestui que trust.* The former cannot acquire a title under the statute of limitations. 3 McC., 467. Their possessions, then, being one and the same, are not inconsistent with each other, and the trustee has not only the right of possession, but the legal possession itself, through his *cestui que trust.* 3d. The appellee submits, that a *cestui que trust,* in possession, is but a tenant at will to the trustee; and if so, that the latter may maintain this action for a trespass, injurious to the freehold. As an authority on the first branch of this proposition, see 1 Cruise Dig., 412, 3 par., where it is said, that a *cestui que trust,* in possession, is considered in a Court of law as a tenant at will, to the trustee. See also 1 Chitty Gen'l. Pr., 750. As to the second branch, see 1 Hill, 260, where it is laid down, that a landlord may bring trespass, *quare clausum fregit,* for an injury to the freehold, though a tenant at will was in possession.

The foregoing authorities seem to establish, that the plaintiffs in this case may claim the rights of trustees, and that one of those rights is, to bring the present action for an injury (cutting trees) to the freehold, though their *cestui que trust* was in possession.

The second ground, taken by the appellant, is, that by the words of William Pledger's will, the trust was executed in the *cestui que trust,* and therefore, that he alone should bring the action.

Whether a trust is executed or not, depends upon the intention of him who created it, as manifested by the instrument declaring the trust. 1 Cruise, Dig., 414, par. 19. It shall not be executed, when any object is to be effected by the legal estate remaining in the trustees. 1 Hill, 413, as when made for the separate use of a married woman, 1 Cruise Dig., 413, par. 15—do., 414, par. 19; or as was the case in 1 Hill, 413, where the trust was to protect the property from being sold for C. P.'s debts, and to provide a home for his family. So that the question

*39] arises, was there any object to be effected by declaring this trust, and *would the execution of the trust defeat that object? This depends upon the words

of the will, from which we must collect the intention of the testator, and then determine whether his intention would be defeated in declaring this trust executed. The words of the will are (so far as they relate to the disposition made of the tract of land here trespassed upon), "in trust, nevertheless, to permit my daughter, Mary Ann Emanuel, to use and enjoy the same, to her sole and separate use, without the control or interference of her husband, during the term of her natural life, and, after her death, to convey the same to the heirs of her body," &c. Here there is an object to be effected, viz.: to permit the testator's daughter to use and enjoy the same, without the control or interference of her husband. If this trust is to be construed as executed, then the whole estate will be placed under the control of her husband, and thus defeat the very object which the testator had in view in creating it. So, then, there is an object to be effected by confining the legal title in the trustees; and the Court will not construe this trust executed, particularly as it was made for the separate use of a married woman, in whose favor the Courts will ever, *if possible*, so construe a devise made for their benefit. 1 Cruise Dig., 413. par. 15.

The third ground of appeal requires no comment, as it is already answered by the remarks made upon the first and second.

The fourth assumes, that the testator reserved the right to cut saw-timber from this tract, which right was bequeathed to P. W. Pledger for life, who sold the same to defendant's father, and that to confirm the title, the land, with this right, was levied on, and sold by the Sheriff to the defendant, under an execution against the testator himself. It is conceded, that such a reservation was made; but it is denied that P. W. P. ever made such sale. There was no evidence of it on the trial. It is also insisted, that under the words of the will, this reserved right did not pass to P. W. Pledger at all, and was altogether undisposed by it. The words applicable to this question are, "*all my lands which I have not hereinbefore disposed of.*" Would a right to cut saw-timber pass under the word "*lands?*" It *would, [*40
if such a right may be classed as real estate. Is it? Timber, growing upon land, is a chattel interest, 1 Comyn on Contracts, 74. So is Wheat. 1 N. Y. Dig., 558. If so, then the right to cut timber growing upon this land, could not pass under the words, "all my lands."

There was no evidence, that the Sheriff sold the right to the defendant's father. His sale-book shows positively that he did not. In fact, is such a right capable of levy and sale, by a Sheriff, under execution? See Bac. Abr., Title Sheriff, N. 5, where it is said, that "if one be a tenant for years, without impeachment of waste, and a *fi. fa.* come out against him, the Sheriff cannot cut down and sell timber, for the tenant had only power to do so, and no interest, as he hath in standing corn, which, upon a *fi. fa.* against him, the Sheriff may sell." In this case there was but a power, which the Sheriff could not levy upon or sell. It is conceded, that he sold a part of the testator's *land;* but, admitting that he had the authority to levy upon the reserved right in question, this cannot avail the defendant, unless he put in execution and sold that right. His own sale-book, as well as his evidence on the trial, established most conclusively, that he neither levied upon or sold it. His deed to the defendant's father conveys it, but that is mere waste paper, without a previous levy, upon all that the deed purports to convey. The only view in which the defendant can expect to be benefitted is, by showing that this right was appurtenant to the tract which he bought, and passed to the purchaser by the sale of the land, as an incident follows its principal. To be appurtenant, it must arise from the express words of the testator's will, or from the long asserted and exercised use of the right to cut timber from the particular tract on which trespass now sued for was committed. No one will pretend that the testator has made it appurtenant, by his will: then, it remains for the defendant to show that he, and those under whom he claims, have exercised this right, without interruption, for the space of twenty years. The testator died in 1825; his widow died in 1832, having occasionally cut timber upon the tract, now in possession of the plaintiff's *cestui que trust*, though not without frequent complaints and interruption on his part. The same state of things continued on the part of P. W. *Pledger and defendant's father, until March, 1840, when [*41
this action was brought. So that, neither from long continued use, from the express words of the testator's will, from the sale of the Sheriff, or from private

contract with P. W. Pledger, can the defendant establish any right to cut the timber in question.

The appellant's fifth ground has been anticipated in the remarks made upon the fourth.

The attention of the Court is particularly called to the report of the presiding Judge, which, in every instance, speaks of the "*right*" to cut saw-timber, and not of the *saw-timber* itself. If the defendant cannot establish his right to cut timber, under the sale by the Sheriff, he must show that P. W. Pledger sold it to him, and that he had a *right* to do so.

Curia, per O'NEALL, J. The only ground, which will be considered, is the fourth. For the judgment to be pronounced upon it, will dispose of this case. The testator, in the third clause of his will, after the death of his wife, devise to the plaintiffs, as trustees for the use of his daughter, Mary Ann Emanuel, "the following tracts of land, one tract where Mr. Emanuel now lives, and the lower half of a tract, lying between Herendenes Prong and Crooked Creek, next to Mr. Crossland's land, (the sawing timber excepted.") Is this exception good? If it is, the plaintiffs are not entitled to recover. For the defendant cut none other, than the sawing-timber, in which the plaintiffs would, in that event, have no interest. I propose to examine this question, with the aid of such lights, as authority may give. For it is one of strict law; and if the exception be consistent with it, no one can say it is contrary to the intent of the testator. His words plainly show, that he did not intend to devise "the sawing timber." To begin with Lord Coke, Co. Litt. 47, *a*, it will be found, that after speaking of a reservation, he says, "and note a diversity, between an exception, (which is ever of part of the thing granted, and of a thing in *esse*,) for which *exceptis, salvo, præter*, and the like be apt words; and a reservation, which is always, of a thing not in *esse*, but newly created, or reserved out of the land or tenement. **Poterit enim quis rem dare et partim rei retinere, vel partim de pertinentiis et illa pars quam retinet semper cum eo est et semper fuit.* But out of a general, a part may be excepted, as out of a manor, an acre, *ex verbo generali aliquid excipitur* and not a part of a certainty, as out of twenty acres, one. "This quotation, in its quaint English and Latin, is not exactly clear, at first view. But the meaning is, when there is a conveyance, by general words, covering an entire whole, made up of such quantities, or things as may be separable, in such a case, an exception of a part is good, and does not pass under general words. It would, however, be different, where the words defined the precise quantity conveyed, as twenty acres; in such a case, an exception of one acre, being inconsistent with the previous grant, could not be allowed. Apply the law, thus explained, to this case, and it is plain, the exception is good. For the devise is of two tracts of land, by general words, except the sawing timber. The devise of the land would, unless restricted, carry timber standing upon the land. Yet it is but a part of the land, which the testator might have severed from it, or sold to another, and being, therefore, a separable part, it might be excepted. But it is unnecessary to follow up this matter, through the various authorities, to which reference might be made. The substance of them all, will be found in Preston's edition, of Sheppard's Touchstone, marg. page, 78. 1st. vol. In that authority, the following passages are found. "And if one grant land, excepting the timber trees thereupon, or excepting the trees thereupon; or if a

*42]

man sell a wood, excepting twenty of the best oaks, and show which, in certain, (or to be taken at his election, or by assignment of the grantee;) these are good exceptions." So, if one have a manor, wherein is a wood, called the great wood, and he grant his manor, excepting all the woods and under-woods, that grow in the great wood, and all the trees that grow elsewhere, this is a good exception." These sentences show plainly, that an exception of timber trees is good, provided it be sufficiently definite, to ascertain what was meant. The only objection, which could be urged to the exception under the will before us, would be, that the words "sawing timber," did not define, sufficiently, the timber intended *to be excepted. But there can be no force in that objection, when it [*43 is conceded, as it is by the report, that none but timber, of the character described in the will, was cut. Independent, however, of this, the terms "sawing timber," are of as certain meaning, as "timber trees" in England, or "rail timber" in this State. They mean such timber, as is proper to be sawed into boards and scantlin. In the pine region, it would be confined to pine timber. In oak and hickory land, it would embrace all the other varieties, which are sawed and used in boards, or scantlin.

The motion for a nonsuit is granted.

RICHARDSON, EVANS, EARLE, BUTLER, and WARDLAW, JJ., concurred.

ABSTRACT FROM THE WILL OF WM. PLEDGER.

1st. All the real and personal estate, given to widow for life.

2nd. A tract of land, to Wm. E. Pledger, and negroes.

3d. To John Terrel, Josiah J. Evans, James Forness, James Irby, and W. E. Pledger, the tract of land, whereon Emanuel lives, (the sawing timber excepted,) and eight negroes; "in trust, nevertheless, to permit my daughter, Mary Ann Emanuel, to use and enjoy the same, to her sole and separate use, without the control or interference of her husband, during the term of her natural life, and after her death, to convey the same to the heirs of her body. But should my said daughter die, leaving no heirs of her body, surviving her, then I give the said above lands and negroes, to the said (trustees,) to permit my son, Philip Williams Pledger, to use, occupy, and enjoy the same, during his natural life, and after his death, to convey the same to the heirs of his body."

4th. Another tract of land and negroes, to same trustees, for Caroline Williams, with limitation similar to the above, with a devise over to Mrs. Emanuel, to hold by her, as in the 3rd clause.

5th. To same trustees, "all my land, which I have not hereinbefore disposed of," and twenty-three negroes, "to permit my son, Philip Williams Pledger, to use and enjoy the same, during his natural life, and after his death, to convey the same to the heirs of his body. But should he die, without any such heirs, then the said trustees are to divide the same, equally, amongst my surviving children, the issue of any deceased child, taking the share of any of my children, who may be then dead. But the shares of my daughters, Mary Ann and Caroline, are to be subject to the same trusts and limitations over, as the estate, the use of which is hereinbefore given to them. This clause is, however, intended to prevent my son, Philip, from wasting the property. Therefore, should he prove to be industrious and frugal, I do, hereby, authorize and empower the said trustees, or a majority of them, should they think it prudent to do so, to convey the property hereinbefore described, to him absolute, whenever "he shall be married, and have a child or children," and in case both my daughters, Mary Ann and Caroline, should die without leaving any children surviving them, then I give the estate, hereinbefore left to their use, to such of my other children, as may be then living, or their heirs.

*6th. Elizabeth Pledger, Executrix, during life, and afterwards the trustees. [*44

Elizabeth Pledger, qualified as Executrix. After her death, no one else has qualified.

I certify, that the foregoing is a correct abstract of the will, of Wm. Pledger.

JOS. DAVID,
Ordinary, M. D.

April 30th, 1841.

See *Clark, et al.*, vs. *Way*, 11 Rich. *An.*

John M. Felder vs. Henry Bonnett.

1. On a question of location, a new trial will more readily be granted, than on most other cases depending upon facts, in consequence of their near approach to questions of law.
2. Natural boundaries, in questions of location, are to prevail, unless there may be some doubt about them, and this doubt is certainly removed by artificial marks. In such a case, the artificial marks will have effect, although of inferior degree.
3. Where a survey called for Dean's Swamp as a boundary, it was held, that the creek, or main stream of the swamp, was intended, and not the outer edge, or margin of low, marshy land, that frequently bounds the main stream.
4. The declarations of a tenant, after he has alienated his right and interest in the land, is inadmissible evidence to prove where a line ran, or a tree stood. (*a*)

Before Richardson, J., at Orangeburgh, Fall Term, 1841.

This was an action of trespass to try titles to a tract of land, lying on Dean Swamp.

The decision of the case depends, mainly, on the location of the tract of land granted to William Hall, for four hundred and seventy-two acres, in January, 1792, from whom the plaintiff deduced title. A diagram is annexed, which will explain the questions made, as to the location.

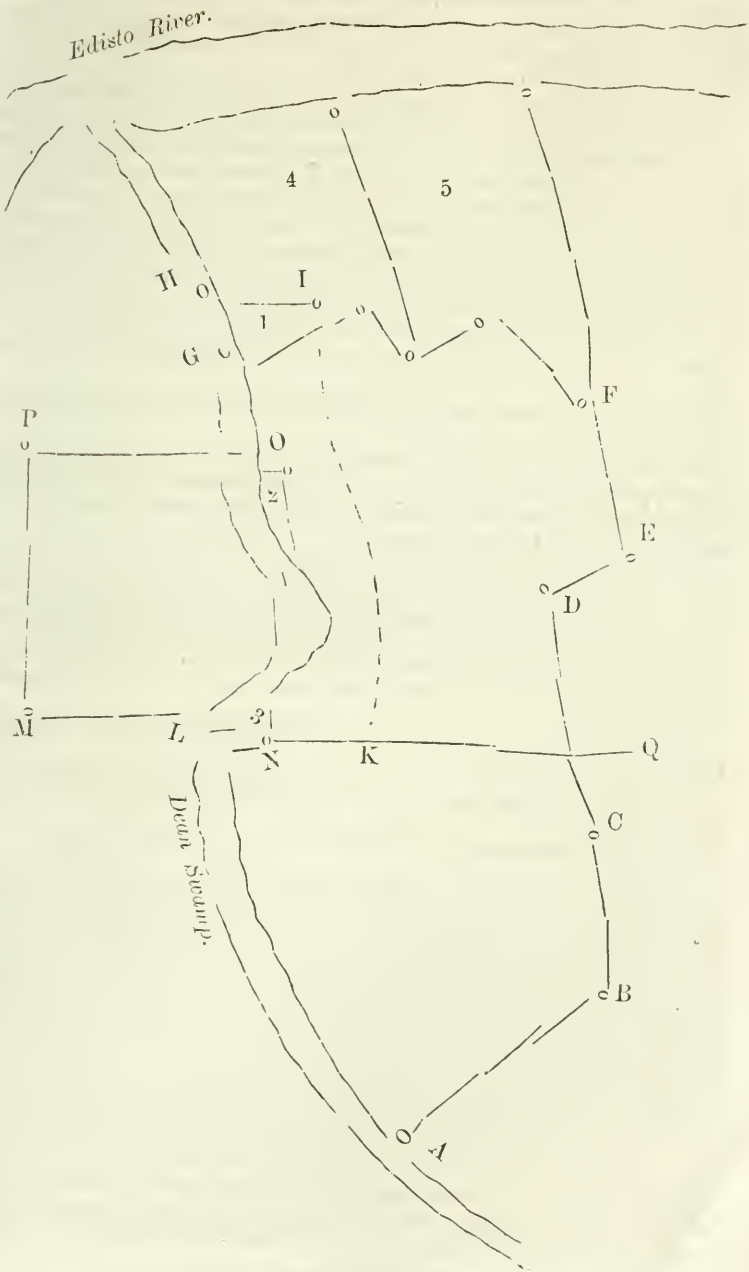
A. B. C. D. E. F. and G. represent the tract of four hundred and seventy-two acres, granted to William Hall. M. N. O. and P. is a grant to one Clarke, for two hundred acres, dated June, 1772, now owned by the plaintiff. H. I. K. and L. represent the lines of a grant to Henry McMichael, for ninety-seven acres, dated 23d November, 1835, devised to defendant, and is the land in dispute. Numbers 4 and 5, are two tracts granted to Hall, in 1801, and now held by the plaintiff. The trespass was admitted. 1, 2, and 3, are in both McMichael's grant, and the grants to Clarke and Hall.

*46] *The William Hall tract, of 472 acres, calls, on one side, for the "edge of Edisto Swamp," and on the other, for "Dean Swamp," and on the side of Dean Swamp, neither course nor distance are given in the plat.

It was insisted for plaintiff, that the *run* of Dean Swamp was intended, and for defendant, that the *edge* of the swamp. No mark tree was found from D. to A., and the course and distance stopped ——— chains short of the run of Dean Swamp, at A., which is now, and has been for many years in cultivation.

On the part of defendant, John Corbett said, that at a survey of these lands, some twenty years ago, he was present with William Hall, Mr. Coalter, and Major Felder, on the dividing line, M. Q., and they found

(*a*) See *Laud* vs. *Lee*, 2 Rich. 169; *Kettles* vs. *Kettles*, 4 Rich. 422. *An.*


Edisto River.
4
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C
Dean Swamp.
B
A

a Pine corner somewhere about N., and, upon that occasion, Hall said he had not run to the creek. Objection was made to the admission of Hall's declarations, because made long after he parted with his interest, in 1798. The objection was overruled.

On the part of plaintiff, Allen Porter stated that McMichael admitted the plaintiff's claim, before he run the 97 acres, and offered to purchase a small portion within the lines of the grant which he obtained in 1835, below N. R. There were a few acres cultivated by those under whom plaintiff claims, within the lines of the McMichael grant. The line K. I. does not define the edge or margin of the swamp, and the surveyors differed as to the number of acres of swamp in the McMichael grant; and they also differed in the representation of Dean Swamp, in connexion with the Clark survey. The plaintiff's surveyor locates the line N. O., on the western side of the run, which is in conformity with the original plat, whilst the defendant's surveyor intersects the run with that line.

The witnesses stated that the stream is, and always has been, called Dean Swamp.

The jury found the following verdict: "We find for the defendant, all the swamp land lying within the new survey granted to H. McMichael, in Dean Swamp, that is not covered by the Clark survey, nor the survey made in the Edisto River Swamp."

*47] *The plaintiff appealed, on the grounds:

1. Because the grant to William Hall, under which plaintiff claims to hold, embraces all the land in dispute, and being older than the grant under which defendant claims, the verdict should have been for the plaintiff.

2. Because the evidence clearly established, and the verdict admitted, the plaintiff's claim to a large portion of the land in dispute, yet the jury found for the defendant.

3. Because the verdict is uncertain, and does not define, or settle the rights of the parties.

4. Because the declarations of Hall, from whom plaintiff deduced title, made long after he had parted with his interest in the lands, ought not to have been admitted in evidence.

Lastly. Because the verdict was contrary to, and without evidence.

Curia, per O'NEALL, J. Question of location approximate so nearly to purely legal questions, that a new trial is more readily granted for error in them, than in any other class of cases depending upon facts.(*a*) For rules of location are legal rules, and the facts to which they are to be applied, are often of such a character, that there can be no mistake in judging here of their effect. The first rule of location is, that natural boundaries are to prevail, unless there may be some doubt about them, and this doubt is certainly removed by artificial marks. In such a case, the latter, although of inferior degree, will have effect. In the case before us, the survey of William Hall calls for Dean Swamp as its N. E. boundry. The only difficulty which could arise, would be, whether the surveyor called for the swamp of the creek, or the creek itself, by the name of Dean Swamp. If there were any artificial marks, which would lead us to conclude that the surveyor stopped at the margin of the swamp, then we would be at liberty to adopt it as the boundary; but, in their

(*a*) Infra, 79. 2 Rich. 384; 6 Rich. 90. *An.*

absence, what is meant by Dean Swamp, must be decided by the known and established understanding in this State. The meaning may be ascertained, by appealing to the usage even of Orangeburgh, in this behalf. Besides Dean Swamp, they have many others, such as Bull Swamp, and Coccaw *Swamp. This name is appropriated to the run, and not to the swamp. In larger streams, such as Santee and Edisto, the [*48 swamp is spoken of distinct from the river, but in creeks with a margin of swamp, the usage is universal in this State, to speak of the creek and swamp as one. In this case, however, I do not think there is any difficulty; for the surveyor showed that he intended to go to the run, by the different manner in which he called for the southern boundary. He there calls for the edge of the South Edisto Swamp. When he calls for the N. E. boundary, he calls for it as Dean Swamp, and represents the stream, and, indeed, judging from the face of the plat, it appears that the corner stands on the bank of the stream.

In *Coates* vs. *Matthews*, (2 N & McC. 99,) Little Saluda, in Edgefield district, was represented as lying within the southern line of the survey. It was held, that the river thus represented, must control the location. So, here, the grant to William Hall must be located by the run of Dean Swamp. It is true, in following the stream, the grant to Clarke is found to run beyond the creek; and, as that is an older grant, the rule governing the location of Hall's grant is to follow the run of the creek, until the line of Clarke's survey is reached, and then to follow the lines of Clarke's survey, until they carry the survey back to the creek, which is then to be pursued to South Edisto Swamp.

When this is noticed properly, it explains Hall's declarations. For it was on the line M. Q., which is identical with the line of Clarke's grant, that Hall said he did not run to the creek. This was the fact at that point, for Clarke's grant intervened. But we do not think Hall's declarations were competent evidence. They were made after he had conveyed. The rule is, that the declarations of a tenant in possession, or a grantor, before he conveys his interest, may be given in evidence. *Turpin* vs. *Brennan*, (3 McC. 261.) After a grantor has conveyed, he may be sworn to impeach his own title, for, in that case, he testifies against his own interest, and this shows, at once, that his declarations cannot be evidence. The question in this behalf, is like that arising in a suit upon a note of hand, when it is passed away, and the declarations of the payee, *after he parted with his interest, are attempted to be given in evidence. In *Lightner ads. Martin*, (2 McC. 214,) it was ruled, [*49 that they were admissible. In *Lester* vs. *Martin & Patrick*, (id. 241,) it was ruled, that declarations made by the endorsee, before he parted with the note, were competent; and, in that case, Judge Nott stated the true rule. "The declarations, acts, &c, relating to the matter in dispute, made by a person *while he is interested*, is good evidence against a party claiming, subsequently, under such person."

The motion for a new trial is granted.

Richardson, Evans and Butler, JJ., concurred. Earle, J., absent.

T. W. Glover, for the motion. *Mr. Witmore*, contra.

William Alexander & Brothers *vs.* Davidson & Davidson.

A *sum. pro.* brought on a note drawn payable to William Alexander & Brothers; pending the suit, William Alexander died. On the trial, the presiding Judge ordered a nonsuit—nonsuit set aside, and ordered to be marked abated, it being the proper order that should have been made under the circumstances.

Before Gantt, J., at Lancaster, Fall Term, 1841.

This was a *summary process*, on the following note:—

"Six months after date, we, or either of us, promise to pay William Alexander & Brothers, forty-eight dollars and 100-75, for value received. As witness, my hand and seal. June 30th, 1840.

(Signed,) "J. F. N. Davidson,
B. F. Davidson."

*50] *And the following are the facts reported by the presiding Judge:—Jackson Miller was sworn, as a witness, who proved the signatures of J. F. N. Davidson & B. F. Davidson, to be their respective handswriting.

Fowler Williams, also, proved the handwriting of B. F. Davidson, affixed to the note. And the plaintiff's counsel admitted that William Alexander was dead.

The presiding Judge ordered a nonsuit, on the ground, that the suit abated by the death of William Alexander, the only person named in the note, and that a decree could not go in favor of the brothers, as survivors, without designating who they were, in the process.

The ground relied on in the appeal is, that a nonsuit was an improper order; that if the suit did abate by the death of William Alexander, that would have been the proper entry

As the suit was attempted to be carried on in behalf of the brothers, after the death of William Alexander, *quoad* the brothers, the nonsuit was properly ordered.

The plaintiff, from this order, appealed, and moved to set aside the nonsuit, and for a new trial, on the following grounds:

1st. Because the suit did not abate by the death of William Alexander, notwithstanding the names of the brothers were not set forth in the plaintiff's process. But would inure to the brothers, as survivors; and his Honor erred in ruling, that the survivors could not recover, unless their names were set out in the process.

2d Because, that if the suit did abate by the death of William Alexander, his Honor erred in granting a nonsuit; but should have marked the case on the docket, as abated, inasmuch as the defendants could not enter up their judgment of nonsuit against the brothers as survivors, unless the names of the brothers had been set out in the process.

3d. Because his Honor erred, in refusing to mark the case, abated; if, in fact, it had abated by the death of William Alexander, and in granting a nonsuit. But the defendants, in order to have availed themselves of the defect, or *51] omission of the names of the brothers, in the *plaintiff's process, should have pleaded the same in abatement.

Williams, for the motion. The parties were not well set out; but the objection was not taken; 1 Hill, 48. The death of William Alexander was no abatement, it might have been suggested; Chev. 215.

Wright, contra. Chitt. (Marg.) Plead. 256.

Curia, per RICHARDSON, J. When the plaintiff, in any action at law, dies, the action abates. Because there is, then, no person remaining to conduct and carry on the action; and, consequently, the power of attorney terminates, and the case is out of court. If, therefore, William Alexander was the only plaintiff, his action abated by his death, and was out of court from the time of his death. But he could not be nonsuited, because there was neither a plaintiff, nor any action remaining, to sustain a nonsuit. A nonsuit is either a voluntary letting fall the action, or the nonsuit is ordered, "*in invitum*," for defect of evidence, or failure in law But, in either case, there must be a plaintiff in being. See Jacob's Law Dict'y, title, "action," *Rogers* vs. *Maddin*, 2 Bail, 321—in order to suffer the nonsuit. The proper inquiry of this case is, therefore, whether there was any plaintiff, surviving William Alexander, who could carry on the suit, or be nonsuited? An action may be sustained in the name of a firm—as in the case of *Martin & Cornwell* vs. *Kelly*, (Cheves' R., 215,) without setting out their christian names. And I presume, in that case, if Martin, or Cornwell had died, the survivor might have still carried on the action, (*Boyleston, et al.* vs. *Cordes*, 4 M'Cord, 144,) because two persons, Martin & Cornwell, had brought the action. But, in the case before the Court, William Alexander is the only person named. The term "Brothers," not being the name of another person, but merely indicating that he had partners of a certain consanguinity. Possibly, the process might have been amended, by inserting the proper names of the brothers of Wm. Alexander. And then there would have been other plaintiffs. But, until that was done, there could be no plaintiff before the Court, but William Alexander, who was dead.

It follows, plainly, from these premises, that no nonsuit *could be ordered. And the case ought to have been marked, "abated by the death of the plaintiff. The nonsuit is, therefore, set aside. [*52

O'NEALL, EVANS, EARLE and BUTLER, JJ., concurred.

J. Williams, for the motion. *Wright* and *McMullan*, contra.

SAMUEL W. BENTLEY *vs.* THOMAS G. PAGE.

1. Where an issue has been made up to try the validity of a debtor's schedule, and a day appointed by the Commissioner of Special Bail, for that purpose, and the jury are in attendance—the question of postponement or continuance, becomes a question of discretion, to be addressed to the Commissioner, who will never grant the motion, unless upon the most satisfactory showing.
2. A plaintiff will not be permitted to add new, and other specifications, to his suggestions of fraud, &c., against a debtor's schedule, after the issue has been made up, and the parties are ready for trial.
3. The notes of the Commissioner of Special Bail, taken on the examination of a debtor, applying for his discharge under the prison bounds' Act, on his previous application for discharge in the same case, and before the specifications of fraud were filed, is inadmissible evidence to go to the jury, on the trial of the validity of his schedule. *Vide, S. P. E. Hyatt & Co.* vs. *John Hill, ante.*

This was an appeal from a verdict before William Ray, Esq., Clerk of the Court and Commissioner of Special Bail, for Union District. Page

was arrested at the suit of Bentley, the plaintiff, on a *ca. sa.*, and on filing his schedule, applied to be discharged under the prison bounds' Act, which was opposed by the plaintiff, on several grounds. The Commissioner, after examining the defendant, refused *to discharge him, *53] and directed a jury to be empannelled to try the issues. The trial was appointed for the 4th August, when the plaintiff moved to postpone it for a future day, on account of the absence of witnesses. The motion was refused, but the statement by the plaintiff, on oath, of what the absent witnesses could prove, was allowed to be read in evidence, and the trial proceeded. The plaintiff then moved to add other grounds of objection to the defendant's schedule, which was refused by the Commissioner. Several witnesses were then examined; and at the plaintiff's instance, the defendant himself was sworn and examined; after which, the plaintiff's counsel proposed to read in evidence, the notes of the defendant's former examination before the Commissioner, taken down in writing by him. This was also overruled by the Commissioner; and the cause was submitted to the jury, who returned a verdict for the defendant. The motion here, is for a new trial, on the ground of error in law, on the part of the Commissioner, in the several particulars mentioned, as well as of error on the part of the jury, in finding a verdict against evidence.

Curia, per EARLE, J. The question of postponement, was addressed entirely to the sound discretion of the Commissioner, as, in like cases, before other judicial tribunals. It was very proper, in disposing of it, that he should consider the interest and convenience of the jury, and others, required to attend this extraordinary court, and to refuse the motion, except upon the most satisfactory showing. It seems to us, that the mode adopted of supplying the testimony of the absent witnesses, ought to have been sufficient to obviate the objection here, as a ground of new trial. We will not review the decision of the Commissioner on that point. He was, likewise, clearly right, in not allowing the plaintiff to add other grounds of objection to the defendant's schedule, after the issue was made up, and the parties had met for trial. If new issues were allowed to be tendered in that way, the proceeding would be interminable, for it could never be known when the case is ready to go to the jury. Besides, the defendant, after preparing to meet the objections filed, *54] would suddenly *be called on to meet others, which must result in doing him injustice, or produce protracted delay. We approve of the rule adopted by the Commissioner, to confine the plaintiff to the grounds of objection, filed in writing, at the time the jury was ordered to be empannelled. The Commissioner was also right, in refusing to the plaintiff's counsel, permission to read the notes of the first examination of the defendant. There is no point of view, in which they can be regarded as competent evidence, for any purpose. The plaintiff had the right, and used it, (under the Act of 1836,)(*a*) to examine the defendant, on oath, touching the matters in controversy. He had, likewise, the right to prove before the jury, that the defendant had sworn differently before the Commissioner; but this should have been done in the same mode that is used in other courts, by calling a witness to testify what the

(*a*) 6 Stat. 556. *An.*

defendant had formerly sworn; any bystander, or the Commissioner himself, would suffice. But the notes taken by the Commissioner, were no more evidence than the notes of any other Judge. He was not required to reduce the examination to writing; and the notes, taken for his own satisfaction, have neither the authenticity of a record, nor the sanction of an oath. The whole proceeding before the jury was, *de novo*, not a continuation; and if the facts, stated by the defendant on the first examination, were to be regarded as proof for the plaintiff, the jury were entitled to hear them from the mouth of the party. If they were intented to contradict, or discredit him, they should have had the sanction of an oath when rehearsed to the jury. The notes were incompetent as evidence, and could only be used by the consent of both parties. Motion refused.

RICHARDSON, O'NEALL, EVANS and BUTLER, JJ., concurred.

Dawkins, for the motion. *Herndon*, contra.

See Mill. Corp. 175. *An.*

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*Q. HYATT & CO. *vs.* JOHN HILL. HAVILAND, HARRALL & ALLEN *vs.* JOHN HILL. [*55

1. The Act of 1836, secures to creditors the right, either in person, or by counsel, to examine and cross-examine a party, who is about to take the benefit of the prison bounds' or insolvent debtors' Act, in the presence of the Judge, or Commissioner of Special Bail, before whom he may be applying. And it is the privilege of such person's counsel, (seeking to take the benefit of either the prison bounds' or insolvent debtors' Act,) to ask the defendant, when on his examination, such questions as he may think proper, in reply to such as have been propounded (and answered) by the adverse counsel.
2. Whenever the Commissioner, or Judge, permits a party to amend his schedule, after specifications have been filed, suggesting fraud, &c., it becomes a new schedule, and the creditor has the same right to examine the party, as to the amended part of the schedule, as he had to the original.
3. The notes of evidence of the Commissioner of Special Bail, taken at a former application of a debtor, for his discharge, under the prison bounds' Act, is not such evidence as should be read to the jury, on a subsequent trial, as to the validity of his schedule. Such testimony is incompetent. *S. P. vide Bentley* vs. *Page*, reported in this Volume.

These cases were tried before James Kuykendall, clerk of York district, sitting as Commissioner of special Bail. The defendant was arrested, in the first case, on mesne process, and in the other on final process. He filed his schedule, and demanded his discharge, which the plaintiffs by their attorney, resisted, and filed with the Commissioner various grounds of objection. The defendant, at the instance of the plaintiffs' attorney, was sworn and examined touching the schedule and his interest in the property. Upon that examination, the Commissioner refused leave to the defendant to answer any questions propounded to him by his own counsel in reply, and by way of explanation. The Commissioner permitted the defendant to amend his schedule, by adding several articles of property, after the filing of the plaintiffs' grounds of objection, and refused permission to the plaintiff's attorney to have him sworn and examined touching the amended schedule. On the trial before the jury

the Commissioner permitted the plaintiffs' attorney to read the notes of the defendant's former examination, in evidence against him. The jury found the following verdict. "We find on the ninth suggestion, that the defendant fraudulently delayed to render a schedule of his property to give a preference to other creditors, and thereby, delay, hinder, and
*56] *defeat their rights, (the rights of plaintiffs); on all the other issues we find for the defendant." On that finding, his counsel moved that he be discharged, on assigning the schedule. The motion was refused, and both parties being dissatisfied with the verdict, furnished grounds for setting it aside, and for a new trial;

The plaintiffs,

1. Because the defendant was allowed to amend the schedule, after the plaintiffs had filed their suggestion, and the jury had been sworn.

2. Because the Commissioner refused leave to examine the defendant, on oath, touching the amended schedule.

The defendant,

1. Because he was not allowed to answer questions, propounded by his own counsel, in reply to the examination of the plaintiffs' counsel.

2. Because the Commissioner permitted the plaintiffs' counsel to read the notes of the defendant's examination, as evidence, on the trial, before the jury.

Curia, per EARLE, J. The finding of the jury, in these cases seems to be unsatisfactory, both to the plaintiffs and to the defendant; for, although the counsel of the defendant insists that it is not sufficient to authorize his detention in custody, yet he has furnished grounds of appeal; and whilst the counsel of the plaintiffs are equally clear, that the defendant is not entitled to be discharged, they likewise appeal and insist that there was error on the part of the Commissioner, and in the verdict of the jury. That was in these words, "we find, on the ninth suggestion, that the defendant fraudulently delayed to render a schedule of his property, to give a preference to other creditors, (over the plaintiffs,) and thereby delay, hinder, and defeat their rights."(*a*) And it has been plausibly argued, that this finding does not convict the defendant of any of those acts, which deprive him of his right to be discharged; as it seems only to charge him with having intended to give a preference to other creditors, and with having intended to delay, hinder, or defeat the plaintiffs. And several of the Court are of opinion, that the verdict, to be effectual in detaining the defendant, should have found the fact, that another creditor was preferred, in some specified particular, or that
*57] *the plaintiffs, by some particular act, were defeated of their rights. But whilst others are of opinion, that the verdict would avail, in its present shape, we are all of opinion, that there was error on the part of the Commissioner, of which either party may take advantage to set aside the verdict; and first, of the exceptions taken by the plaintiff. There is some difference of opinion in regard to the propriety of allowing the defendant to amend his schedule, after the grounds of objection were filed, and the omissions pointed out. But, as we conclude to send the case back for a new trial, we will permit the schedule to stand as amended. The Act of 1836,(*b*) however, secures to the creditors in person, or by attorney, the right to examine and cross-examine the defendant on oath, in presence

(*a*) 2 Stat. 137; 2 Rich. 463; 1 Rich. 290. *An.* (*b*) 6 Stat. 556. *An.*

of the Judge or Commissioner, touching the truth of schedule, and touching the nature and extent of his property, rights, and credits, liable to be assigned. When the Commissioner allowed the defendant to amend his schedule, by inserting other articles, or assets, it became virtually a new schedule, and the creditor had the same right to examine the defendant, on oath, touching the articles added, that he had in regard to the original schedule; and there was error in refusing leave to examine him. So, too, I do not perceive the ground on which the Commissioner refused leave to the defendant to answer such questions as were propounded by his own counsel. He had a right to be assisted by counsel present with him at the examination; and after answering all the questions propounded by the adverse counsel, it would seem but fair that he should be allowed to make such further explanations, as might be suggested in questions propounded by his own counsel. He is not required to answer certain interrogatories set down in writing, but to be personally examined, and cross-examined; which, I think, implies the right to answer questions of his own counsel in reply. We think there was, likewise, error on the part of the Commissioner, in permitting the counsel of the plaintiffs to read, as evidence to the jury on the trial, the examination of the defendant, in writing previously taken before him, when the defendant applied for his discharge. We have already, at this term, considered that question, and have held, in *Bentley* vs. *Page*, (*a*) *that the Commissioner's notes of the defendant's examination are not competent evidence. [*58 If the contesting creditor under the Act of 1836, may have the benefit of the defendant's examination on oath, before the jury he must be sworn and examined in their presence.

We are of opinion, therefore, that the verdict should be set aside, and a new trial ordered: and the plaintiffs have leave, if they think fit, to amend their ninth ground of objection to the defendant's discharge, so as to render it more specific and certain.

RICHARDSON, O'NEALL, EVANS and BUTLER, JJ., concurred.

J. D. Witherspoon, for the motion. *G. W. Williams*, contra.

GEO. W. SMITH *vs.* COOK & NORRIS.

A bond given under the Trover Act of 1827, to the Sheriff, is not assignable; and the assignee of such a bond cannot sue, in his own name, on the bond.

Before EVANS, J., at Laurens, Fall Term, 1841.

The plaintiff sued Cook in trover, who, with Norris, the other defendant, gave a bond for the delivery of the property, if the plaintiff recovered. The plaintiff did recover, and the property was not produced. The bond was taken to the sheriff, under the Act of 1827, (*b*) who assigned it to the plaintiff. The only question in the case was, whether the bond was assignable. The bond was payable to the sheriff and his assigns; and as it was given for the benefit of the plaintiff, the presiding Judge thought, and so decided, the action would lie.

(*a*) Supra, 54. *An.* (*b*) 6 Stat. 337.

The defendant moved for a nonsuit, because the bond sued on was not assignable, so as to enable the assignee to sue on it, in his own name.

*59] *Curia, per* EVANS, J. By the common law, a bond was not assignable so as to authorize the assignee to bring an action in his own name. We have no general law authorizing such actions. The Act of 1788(*a*) does not; for that, it has been decided, relates only to money bonds. In *Cobb* vs. *Williams*, 1 Hill, 375, the action was on a guardianship bond, given to the Commissioner in Equity, and by him assigned to the plaintiff. *Peck* vs. *Glover*, (1 N. & McC.) was by the assigneee of the sheriff, on a prison bounds' bond, where the defendant had been arrested on mesne process. In both these cases, it was decided, the action would not lie, because the bonds were not made assignable by any Act of the Legislature. In all cases, where the assignee may sue in his own name, it is by virtue of some statutory regulation. The Act of 1827, under which this bond was taken, contains no such provision, and the action should have been in the sheriff's name. The motion for a nonsuit is, therefore, granted.

RICHARDSON, O'NEALL, EARLE, and BUTLER, JJ., concurred.

Young, for the motion. *Mr.* ———, contra.

See 9 Rich. 471; 11 Rich. 434; 4 Strob. 284; 4 McC. 218. *An.*

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*60] *N. POPE *vs.* A. H. FORT.

Defendant undertook, in writing, to pay the amount of a note, of one Groner, to to the plaintiff, when he should be in possession of funds, belonging to Groner. *Held*, that an action could not be supported against the defendant, upon his undertaking; it being void, for want of a consideration, to support the promise.

Before RICHARDSON, J., Richland, Fall Term, 1841.

The following summary of the facts, of this case, will be found (with the grounds of appeal,) sufficiently intelligible, to a proper understanding of it.

The defendant, Fort, assumed in writing, to pay the plaintiff, Pope, the amount of a note drawn by one Groner, when in funds for the maker, (see the note.)

The question was, whether Fort had received such funds. Davis proved that Fort was a commissioner of public buildings; the commissioners were indebted to Groner for work done; and Fort thereupon made the written assumption.

Groner, (being first released by Pope,) then swore, that Fort was chairman of the board; and after the assumption to Pope, he (Fort) paid the witness one hundred dollars for his work, by a check upon Major Hart, which was received, but his note never was taken up, as he wanted the money to get married.

Major Hart also proved that the check had been paid, &c.

(*a*) 5 Stat. 330.

Isaac Tickner said he had called on Fort for payment; who said he would pay it, as soon as he got the money for Groner

West Caughman said Groner called for his money, and the board authorized Fort to draw one hundred dollars to pay him.

Captain Harman said Groner applied for the money, *i. e.* fifty dollars to pay the witness, and fifty dollars to get married

The Court held Fort liable, upon this evidence, and decreed for plaintiff.

[*Copy of the note, referred to, and of the defendant's promise.*]

"65,75. Three days after date, I promise to pay, to N. Pope, or bearer, sixty-five dollars, and seventy-five cts. for value received of him, the 24th of March, 1840.

(Signed,) N. W. GRONER."

*"Mr. Pope left in my hands the original, of which the above is a copy, which I am requested by the maker to pay, which I will do, whenever his funds come to my hand. [*61

(Signed,) A. H. FORT.

Aug. 10, 1840.

The defendant appealed and moved *for a nonsuit*, upon the ground, that the *allegata* and *probata*, did not correspond, in this, because it was alleged in the process, that the defendant promised unconditionally, to pay the note of N. W. Groner, when, in fact, as appeared from the evidence, he only promised to do so, when funds, belonging to Groner, should come to his hands.

And also, to *reverse the decree* of His Honor, upon the following grounds:

1st. Because there was no evidence, that any funds belonging Groner, ever came into the hands of defendant: And

2d. Because the defendant, in giving the order on the Treasurer, acted in in his official capacity, as chairman of the Commissioners appointed to superintend the building of the Lexington Court House, in obedience to their order, as proven by the witness, Caughman, and had no power or authority individually, to retain the order in his own hands, or to draw the money himself, the said Commissioners having made a special order, that Groner should be paid the amount of the draft.

3. Because the promise of defendant, to pay Groner's debt, was without consideration, and therefore void.

Boozer, for motion, said the *allegata and probata* did not correspond, *Hilberson* vs. *Paysinger*, 1 Bail, Rep. on 2nd ground. He said there was no consideration to support the promise; there would be none, until funds were received, cited Riley's L. Cases, 56. The consideration must be proved. Powell on Cont. 343 to 356; 5 J. R. 6 Ib. 272, 18 J. R. 145.

Mr. ————, contra.

Curia, per EARLE, J. This action is brought against the defendant, on his alleged undertaking, to pay a debt, due *to the plaintiff, from one Groner, by a note of hand. The promise relied on is in writing; and so far complies with the statute of frauds, as we do not now require the consideration to be expressed. But there are several objections to the plaintiff's recovery; some arising out of the process, others out of the paper itself, as a legal assumpsit, to sustain an action. It is not, itself, a note of hand, importing consideration; and none is set out in the process. If we dispense with that, as I suppose we may, under the liberal (perhaps it would be more true to say, loose,) practice in that jurisdiction, yet, the promise to pay is on a contingency, "whenever his funds come to my hands." Now surely, the process should have [*62

alleged the receipt of funds, and when; with a refusal to pay. But supposing this to be cured too, does the paper itself, and the proof, authorize the decree? Regarding it as an undertaking to pay the debt of another, some consideration is necessary; some loss, or inconvenience to the plaintiff, or some benefit, however slight, to Groner, or the defendant; and, I confess, I do not perceive either. There is no stipulation for forbearance to Groner, much less, to discharge him, in consideration of the defendant's promise. The defendant, himself, did not owe Groner, and could derive no advantage from paying his debt. The plaintiff deposited the note with defendant, although, it was payable to bearer; this was no transfer, but only to enable him, whenever Groner's funds came to hand, to apply them and deliver up the note to Groner. On considering the terms of the paper, and the whole complexion of the case, I think it apparent, that this could only be done with Groner's consent; and that, in fact, there was no undertaking, on the part of the defendant, to pay the debt out of his own funds. Groner made no assignment of the fund to the plaintiff, so as to make it money, had and received, in the hands of defendant, to the use of the plaintiff. He requested Fort to pay the note, and Fort said to the plaintiff, I will do so, as he has requested me, when his funds come to my hands. Before that event happened, Groner changed his mind, and countermanded the order to pay the plaintiff, as it was competent for him to do. So far from assigning the fund to the plaintiff, by drawing on Fort, in his favor, there does not appear to have
63] been any communication on the subject, between Groner and the plaintiff. As between him and the defendant, it was competent for him to revoke, at pleasure, any order given for the payment of the money, before it was paid. If the undertaking was not such as I have supposed, and the understanding of the parties, likewise, why was not a check drawn at once on the treasury, in favor of the plaintiff, to pay Groner's note? I think there was no legal undertaking to pay, founded on any consideration, proceeding from the plaintiff, to sustain this action. The defendant might, gratuitously, have undertaken to collect this note for the plaintiff; if he did so, and the note was intrusted with him for that purpose, and he entered upon the performance of the trust, he would be bound to act honestly, and would be answerable for the damages, if he were guilty of culpable negligence. The action here, however, does not rest upon these grounds, which it will be time enough to consider when they come before us. The motion to set aside the decree, and to enter a nonsuit, is granted.

O'Neall, Evans and Wardlaw, JJ., concurred.

Butler, J., *dubitante.*

Richardson, J., *dissenting.* The only important question in this case, is, whether there was any legal consideration, to support the written assumption of Fort, to pay the note of Groner; and, thereby, render his assumption binding in law, according to the statute of frauds. Groner had requested Fort to pay the note to Pope; whereupon, Fort took possession of the note, which was payable to bearer; Fort then made his written assumption, upon a copy of the note. What was the consideration; whether the note was assigned, by the delivery to Fort,

or was placed in his hands, as an indemnification only? Still, Fort either accepted it as, and for a guaranty, or as assignee by the delivery. In either case, it was a security for his assumption and, therefore, a valuable consideration. If he took the note as his own, he was fully paid for his assumption. If he took it as a bailee, he then held a pledge for *his indemnity from loss. Fort could not lose, in any event. For he undertook to pay the note, only in case he received Groner's [*64 money. But he chose, for greater security, to hold the note, while, at the same time, Groner was precluded, by Fort's assumption, from all claim to his money. Here were, then, two considerations for Fort's assumption; the deposit of the note, payable to bearer; and Groner's preclusion, from his right to the money, by his own authority. Thus Fort stood secured, and counter secured. And either was enough; if we are to regard the doctrine, so well laid down in *Eggart* vs. *Barnshire*, in 3 McCord's Reports, 163, and so fully reconsidered in the case of *Filer & Givens*. To show how small a consideration is required to support an express moral contract, and to prevent good faith being broken, for want of it, see the cases collected in note "A." in the appendix to 3d McCord's Reports. In the case of *Duncan* vs. *Gadsden*, Harper, 364, the written assumption on Ogden's note, was this; "the within amount, I promise to pay, when in funds, for Robert Ogden; the period not to exceed six months." But the funds were not proved, and the case failed. But, suppose the funds had been received, then, would not the consideration have been good, or must the consideration be, always, *in presenti?* In such cases, I apprehend, that the consideration is money expected; which, when realized, by the receipt, verifies the consideration; which was before, (like the assumption itself,) executory and conditional only. It is like the acceptance of a bill, if the funds of the drawer should come to hand, which is a binding contract, only, if the funds come. Here, the consideration is executory, not *in presenti*, yet good in law. But, without urging the doctrine so far; I ask, if Groner could have recovered the money of Fort, after Fort had assumed to pay it, at Groner's request, to Pope; and, also, held Groner's note, payable to bearer, for the very amount? He could not. Then, was not Fort equally bound to pay it to Pope? He certainly could not, legally, keep it for himself. Substantially, Fort had the conditional release of Groner for the money, had fulfilled the condition, by his express assumption to Pope. But, he prudently took the note, for perfect safety sake. How these facts can be construed into no consideration *for his assumption, I cannot perceive. It seems to me, that the statute was [*65 fulfilled to its letter; and the rule of the common law, against "*nuda pacta*," to its reason and spirit. In the case just decided, of *Moore* vs. *Denson*,(*a*) Ballard placed in the hands of Hemphill, the note of Denson, to counter-secure Colclough, for his assumption, to pay Ballard's debt to the bank. Now if Colclough, upon this security, to pay Ballards' debt to the bank, was not bound so to pay, then the assignment of Denson's note to him was a *nudum pactum* and void, and our decision is erroneous. But, suppose Colclough had afterwards actually received the money of Denson, and had chosen to pay it over to Ballard,

(*a*) MS.

instead of the bank, how could that have lessened his liability to the bank? This was what Fort did; he received the money, realized the consideration of his promise to Pope, and chose to pay the money over to Groner, instead of Pope. But, was not both he and Colclough in the common situation of a surety, who undertakes, in writing, to pay the debt of a third party, after being indemnified. Or of a broker, who lends his name for a premium, or upon counter-security being first placed in his own hands. But the proper way to adjudge the case, would be to take it at the moment before Fort paid the money to Groner, and ask, to which of the parties would the Court have assigned it, under the statute of frauds, which so wisely requires an assumption in writing, in all such cases, and under the common law, which, as wisely, requires some consideration, or good cause for the assumption, to be either expressed or proved? The rest of the case is not very important, but I would save it from any estoppel in law, which would go to fix a principle for other cases.

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*66] *H. A. Culpepper *vs.* E. B. Wheeler et al.

In an action of trespass to try titles, to a tract of land, in order to give in evidence an attested copy of the deed, under which the party claims the land in dispute, it is only necessary to prove the existence of the original and its loss. That it cannot be found after a diligent and proper search, with those who should have the possession of it.

Before Earle, J., at Marion, Fall Term, 1841, who made the subjoined report.

The land in dispute was granted to Henry Lambert. The plaintiffs are the heirs at law of Mary Godbold Smith, and claimed one half of the tract under a deed of conveyance, said to have been made by Lambert, the grantee, to Mary Godbold Smith and her sister, Julia Ann Smith. The original deed was not produced, and an office copy was allowed to be read in evidence under the following proof. The deed purported to bear date 9th February, 1805, and conveyed two hundred acres, the lower part of the tract granted to Lambert, by specific boundary. James Tait married Julia Ann Smith, one of the grantees in the deed, and entered upon her portion of the land in 1825, under that deed, which she had in her possession at the time of her marriage. He and his wife sold and conveyed their part of the land to Benjamin Holt, and he supposed he gave the original deed to Holt, who afterwards sold and conveyed that part of the land to the defendant Wheeler, who has been in possession ever since. The deed, from Tait and wife to Holt, was executed in 1830, and from Holt to the defendant in 1832. Holt is now living in Mississippi. It appeared further in evidence, that Wheeler had also claimed to have acquired title to the moiety of the land belonging to Mary G. Smith, or to the plaintiffs, her heirs, although he did not set up this title on the trial. A. L. Scarborough purchased this part of the land from the defendant, and took a conveyance. But he subsequently sold and re-conveyed to the defendant. The

original deed from Lambert was not in his possession, nor did he see it. If delivered by Holt to the defendant, it was retained by him, as he was in possession of the remainder of the land. The witnesses to the original deed, or persons bearing the same names, were living in the neighborhood at *the date, but are now dead. The deed appeared to [*67
have been proved and recorded about 1828, and Levi Oldham, before whom it purports to have been proved, was then an acting Justice, and is still living. The defendant was a deputy in the office of the Clerk and Register at the same time. Written notice was given to the defendant to produce the deed, and his return in writing was read, stating, that after diligent search among his papers, the deed could not be found.

On the foregoing proof, I allowed the office copy to be read in evidence, and the plaintiffs obtained a verdict, which it is now moved, on behalf of the defendant, to set aside, on the ground, that the existence and loss of the deed of Henry Lambert to Mary G. Smith and Julia Smith, was not sufficiently proved to authorize the admission of an office copy in evidence.

Dargan, for motion. 1 Bay, 495; 1 M'C. 318; 2 Hill, 525; *Id.* 542.

Sims, contra. 3 Stat. at Large, 303, § 30, A ——— deed is as good evidence as the original and ought to stand. He calls for a review of *Purvis* vs. *Robinson*. The Court refused permission to argue that question.

Curia, per EARLE, J. The argument on the part of the defendant assumes, that in order to admit an attested copy of the deed from the register's office, it is not only necessary to prove the existence and the loss of the original, but that there should be some proof of the actual execution; no case has gone thus far. In *Purvis* vs. *Robinson*,(*a*) it was only held that the record, or an attest copy, should supply the loss of the original. So in *Dingle* vs. *Bowman*, and in *Turnipseed* vs *Hawkins*, 1 McC. 177–272, it was held only necessary to prove the loss of the original, in order to admit the attested copy as secondary evidence. The cases of *Peay* vs. *Pickett*, and *M'Laurin* vs. *Talbot*,(*b*) have introduced no change in the rule, but relate only to the kind and degree of evidence which shall be deemed sufficient to establish the loss of the original; and both result in the same conclusion, that there is no better way to prove the loss of a thing, than to show that it has been sought for *where it ought to be, where it is usually kept, and might be ex- [*68
pected to be found, and that it has not been found. It is true Mr. Justice Harper, in *M'Laurin* vs. *Talbot*, speaks of the proof afforded there, of the deed's existence; and says, it is hardly possible to prove the loss of a deed, without giving some evidence of the existence and contents, or general purport. The evidence in the case before us, of the existence of the original deed, as a genuine paper, is fuller and stronger, than it was in *M'Laurin* vs. *Talbot*, and of the same kind. Tait, who married one of the grantees, in the deed, and under whom the defendant derives title, found in the hands of his wife, at the time of their marriage, a deed purporting to be a conveyance from Lambert, such as the plaintiffs set up for the land in question; under that deed he entered upon the land as his wife's property, and held possession until he sold to Holt, who entered,

(*a*) 1 Bay, 493. *An.* (*b*) 3 M'C. 318; 2 Hill, 525. *An*

and afterwards sold to the defendant—and he has been in possession ever since, claiming title to the moiety of Julia Ann Smith, under the same deed, the existence of which he denies, and requires to be proved. The entry of one of the grantees, and the continued possession since 1825, under her title, affords abundant evidence of the existence of the deed as a genuine paper, as well as of its general contents and purport; even if the cases, on the construction of the Act of 1731,(*a*) required such proof. The language of the Act is, that the records of deeds, "duly proved before a justice of the peace in the usual method, and recorded, &c., and also, the attested copies thereof, should be deemed to be as good evidence, in law—and of the same force and effect, as the original would have been, if produced." It has been held that the original, if in existence should be produced. If lost, or if, after proper search, it cannot be found, its being proved in the usual mode, before a justice of the peace and recorded, is, I apprehend, sufficient evidence that it once had existence. Next, as to the evidence of its loss. It was delivered to Holt, who conveyed to the defendant, in 1832. The title deeds should accompany the possession, and be in the hands of the owner. And it is a reasonable conclusion of fact, as well as a presumption of law, that when
*69] Holt conveyed to the defendant, he likewise delivered the *title deed. Holt is a resident citizen of a distant State, not amenable to process issuing here, and incompetent as a witness, if he were. If he did not deliver it to Wheeler, the deed may well be considered beyond the reach of the plaintiffs, and, therefore, lost; and if delivered to Wheeler, which is far more probable, we have his own declaration, in writing, that after diligent search the deed cannot be found. If, under such circumstances, the attested copy from the records is not competent, the registry of deeds is a mockery. The whole Court agrees that it was properly received, and the motion is refused.

RICHARDSON, O'NEALL, EVANS, BUTLER, and WARDLAW, JJ., concurred.

Dargan, for the motion. *Sims*, contra.

See *O'Neall* vs. *Isbell*, 9 Rich. 374; Act of 1843. 11 Stat. 255. *An.*

THE TREASURERS *vs.* THE EXECUTORS OF MCPHERSON.
THE SAME *vs.* THE SAME.

After the lapse of twenty years, the conditions of a Sheriff's bond will be presumed to have been performed.

Before O'NEALL, J., at Gillisonville, Beaufort District, Spring Term, 1841.

These were actions of the debt on the official bonds of Deveaux, Ford and Ferguson, former Sheriffs. They were brought to recover sums received by them for the State, and with which they were respectively charged on the books of the Treasury, more than twenty years before action was brought. The only question made in the cases was,

(*a*) 7 Stat. 176, § 39; See *Purvis* vs. *Robinson*, &c.

*whether, after a lapse of twenty years, performance of the duties, conditioned to be performed in an official bond, would be presumed. The presiding Judge held, that it would. The plaintiffs submitted to verdicts for the defendants and appealed. [*70

Because the Court erred in deciding that, after a lapse of twenty years, performance of the duties conditioned to be performed, in an official bond, would be presumed.

Curia, per O'NEALL, J. We are satisfied with the decision of the Judge below. It has been again and again ruled, that the presumption of performance of the condition, upon an official bond, from the lapse of time, will arise, as well as the presumption of payment of a money bond. It is no objection that the State is the party against whom the presumption is set up. It is true that the maxim "*nullum tempus occurrit regi*," applies to the State, but by that I understand that the King, in England, and the State, here, cannot be barred by the statute of limitations. A legal presumption is not set up as a statutory bar. It is a legal conclusion after the lapse of twenty years (without some countervailing proof,) that a fact then existed, (which cannot now be proved,) sufficient to defeat the right of the State. Such as that the State, twenty years ago, granted a tract of land, or received the money charged on the books of the treasury against the Sheriffs, Ford and Ferguson.

The motion is dismissed.

RICHARDSON, EVANS, EARLE, BUTLER and WARDLAW, JJ., concurred.

Edwards, Solicitor, for the motion. *Singleton*, contra.

See 11 Rich. 424. *An.*

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*LESLIE & CALHOUN *vs.* JAMES TAGGART, ET AL., SURETIES OF JOHN TAGGART, SHERIFF. [*71

The sureties to a Sheriff's bond are not liable for the costs, incurred in establishing a *nulla bona* return against their principal.

Before O'NEALL, J., at Abbeville, Fall Term, 1841.

This was a suggestion filed by the plaintiffs, to recover, on the bond of Jno. Taggart, late Sheriff of Abbeville district, the costs incurred by them in establishing a *nulla bona* against him.

The presiding Judge ruled, that the sureties were not liable for such costs, and therefore quashed the suggestion. From this decision, the plaintiffs appealed, and moved to reverse the same, on the ground of error, in the decision of his Honor, the presiding Judge.

Wilson, for the motion, cited and relied on 2 Vol. Stat. 1106, marg. p. 1120, and 1 Hill, 398.

Wardlaw, and *Perrin*, contra: Submitted the case without argument, or reference to authority.

Curia, per O'NEALL, J. In this case it is only necessary to look into the defendant's bond, to decide that they are not liable for the costs of

cases, to establish a return of "*nulla bona*," against their principal. The condition is "that Jno. Taggart shall well and truly perform the duties of the office of Sheriff, of Abbeville District, as now, or hereafter required by law, during the whole period he may continue in office." Under it they are liable for money, by him collected and not paid over, and for all damages sustained by his failing to perform his duty But they have not undertaken to pay the costs of cases, which might be brought against their principal, and much less have they undertaken to pay the costs which may be incurred, in establishing a *nulla bona*. The Legislature required the plaintiffs to obtain that evidence, before they could resort to the sureties. It was one of the guards interposed between them and the Sheriff's creditors. But there is nothing in that which can make them liable. They have the right to say there is our bond, according to it we will pay, beyond it we will pay nothing. The motion is dismissed.

GANTT, RICHARDSON, EVANS, EARLE, and BUTLER, JJ., concurred.

See Supra, 21. 10 Rich. 445; 8 Rich. 413; 4 Rich. 212; 1 Strob. 27 *An.*

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*72] *JOHN W. SMITH *vs.* JNO. PICKENPACK.

The possession of a small slip of land, for ten years, (adversely,) with a fence, will give a good title to the land, under the statute of limitations.

Before BUTLER, J., at Spartanburg—Extra Term, 1841.

This was an action of trespass to try title to a small slip of land of fifty yards length, and *one* link in breadth. Or it might better be characterized to say, that it was to try the right to a fence. Both parties claimed under a Mr. Bearden, who had divided a tract of land between his two sons, John and Ben. The plaintiff claimed under Ben, and the defendant under John, through intermediate owners of the land In 1823, Wynne Bearden, the son of Ben, run a fence from the road to the opposite side, on what he supposed was the dividing line. In 1826, the defendant, who was then the owner of the other part of the land, petitioned to Wynne Bearden to join fences. Permission, however was refused, and Pickenpack, the defendant, to enclose a new ground, run his fence obliquely till it struck Bearden's fence, at a ground pole; and thence run it parallel with the other to the road, interlocking all that way—so that, at one time, there were two fences standing. One disappeared, and the question was, whose fence had been left, as the common dividing fence between the parties. Dr. Smith, the plaintiff, who became the owner of his land (the Ben Bearden part) in 1830, contended that the original fence, put up by Wynne Bearden, was left, and that defendant had joined to it—whilst the defendant contended that plaintiff had taken down his fence, and joined to the one put up by him (defendant) in 1826. The evidence was satisfactory that the plaintiff had joined to defendant's fence, and had taken his away sometime in 1826, or 1827. The jury so found, for they found for the defendant. According to the finding, the

case stands thus—for fourteen years, defendant has had his fence on a small slip of land, originally belonging to plaintiff, believing at the time he made the fence it was entirely on his own. The jury were instructed that the land thus covered, or occupied by defendant's fence, became his by *the statute of limitations, and that he had a right to the fence on the land. The question arose upon the defendant's right to [*73 take down the fence which he had put up. The plaintiff forbid him taking it down, and, by threats of violence, drove defendant's hands off while they were moving the fence, in the presence of their master and in obedience to his orders. Before the defendant undertook to move his fence, he sent plaintiff word that he was going to do so, with a view of opening a lane for the neighbors to pass through. The action was brought to recover damages for taking down a few rails. Under these circumstances, and if the land is plaintiff's he had a right to recover something, but if it was defendant's he ought to have failed in his action.

On one occasion, plaintiff said "they were going to join fences," "or he was going to join his fence to defendant's," but there was no evidence that defendant had ever consented to it. The ground that it was a division fence by the consent and agreement of the parties, was irreconcilable with the ground assumed by plaintiff, that the fence was entirely his own, and that he had permitted defendant to use it at sufferance. The presiding Judge's opinion was in conformity with the finding of the jury, that defendant was justified in taking away his own fence from off his own land.

The plaintiff appealed on the following grounds:

1st. Because his Honor erred in charging the jury that if the defendant built the fence which he removed, and was the subject of the trespass, he had a title by the Statute of Limitations, when it was admitted that the fence was on the plaintiff's land, and the defendant only claimed to have built the fence, and held it four or five years, when the plaintiff joined his fence to it, and used it as the enclosure of his field ever since, and therefore, if defendant assented to it, he did not hold adverse to plaintiff, and if he objected to it, the plaintiff, held the fence adverse to the plaintiff's claim, and in either point of view, there was no statutory title in defendant.

2d. Because, whether the defendant consented to the joining of fences, was a fact upon which there was some *evidence,—yet his honor withdrew [*74 that question from the jury.

Curia, per BUTLER, J. The jury have found that the defendant made the fence which he was removing and that he has used it as his own for more than ten years. It is not denied that, at the time it was erected, the defendant believed he was exercising a right on his own land, or land which he believed to be his own, and it is conceded that he has acquired a good title, by the statute, to every inch of the ground included within the fence; but it is contended that the land covered and actually occupied by the fence itself continued to be the plaintiff's, as he had joined his fence to that of defendant. There was no evidence that plaintiff had obtained defendant's consent to join fences. On the contrary, I think it was apparent that it was done against the wishes of the defendant. Be that as it may, the plaintiff's possession under his fence was only to the fence of the defendant. It did not embrace land either beyond or under it. The plaintiff's actual occupation was his own exclusively, as much so

as if he had held it by the wall of a house occupied by himself. In effect it was *possessio pedis* to the fence and under it a possession commencing too under circumstances which plaintiff should never have questioned; as at the time of its commencement there was a fence on plaintiff's land indicating its utmost limit and one that was put there to be regarded as an actual boundary. We are all well satisfied with the decision below and refuse this motion.

GANTT, EVANS, EARLE and O'NEALL, JJ., concurred.

Henry and *Bobo*, for the motion. *H. C. Young*, contra.

See as to tenancy in common of division-fences, 2 Bail. 389; 3 Strob. 446. *An.*

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*75] *THE HEIRS AT LAW OF WOLFE *vs.* WILLIAM KNOTTS.

Where the verdict of a jury is contrary to the weight of evidence in a cause, and against the established rules of location, a new trial will be granted.

Before RICHARDSON, J., at Orangeburgh, Fall Term, 1841.

This was an action of trespass to try titles. The land claimed by the plaintiff was granted to John Wolfe, for 200 acres, the 4th May, 1775, who conveyed it to his son, Joseph Wolfe, 14th February, 1814, and the plaintiffs are his heirs at law.

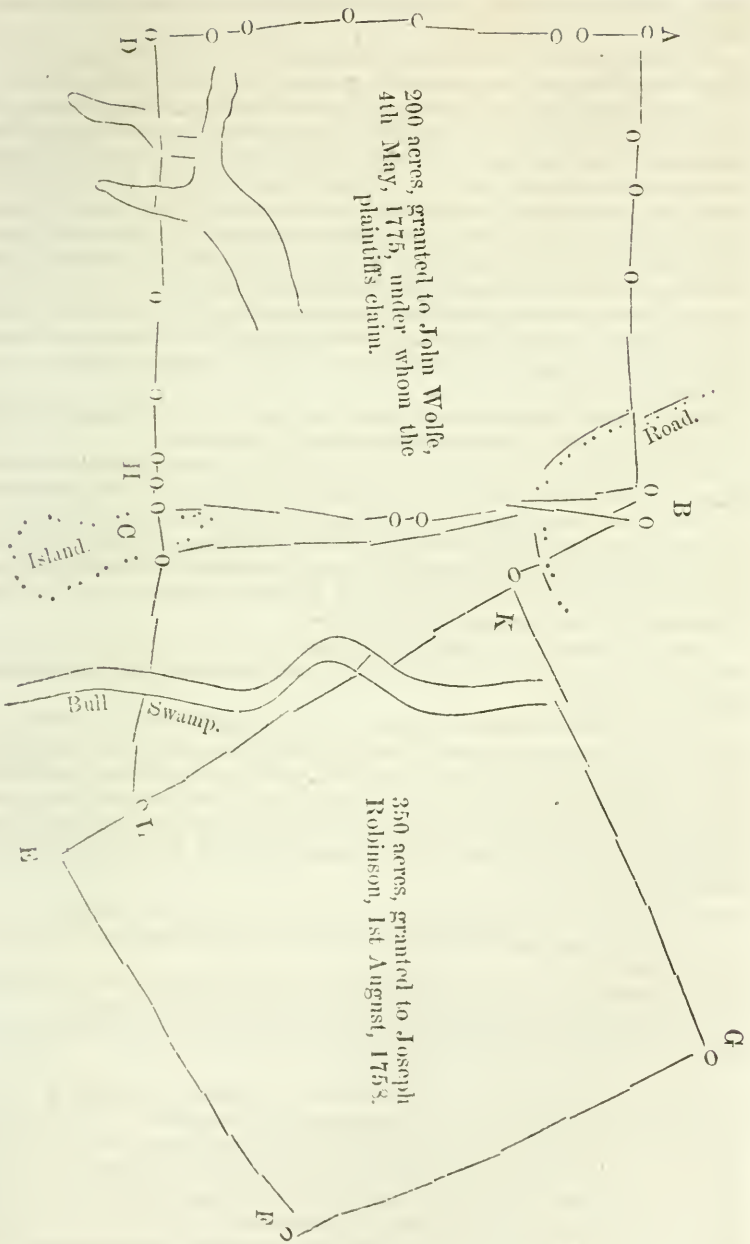
On the location of the land to John Wolfe, the case depended.

The annexed diagram will more clearly explain the points made, and the questions to be decided.

A. B. C. D. represent the plat which accompanies the grant to John Wolfe. K. E. F. and G. are the lines of a grant to one Robinson, in 1758, and B. C. and L. embrace the land in dispute. The corners at A. B. C. and D. are marked on the original plat, and the only question was, whether a corner was made at C. A pine is called for at that point, on an island in Bull Swamp, which the surveyor did not find. A hickory station is called for at H. on the line D. C., and is found at the proper distance. All the other stations and line trees on the lines B. A.—A. D. and D. C. are found, and an island is found in Bull Swamp, corresponding with the one represented in the original plat, and at the correct distance for the corner, C. On which some of the witnesses testified that many of the old growth of pines had been destroyed, and a new one had sprung up.

Samuel Pearson said, that he was present at a re-survey of this land, about thirty-two years ago, with the grantee, and a surveyor named Johns, or Jones. The grantee, he understood, was about to convey it to one of his sons.

They then found a pine corner, standing on an island, about the point C. They did not cross Bull Swamp. A line was marked somewhere in the direction of B. C. David King was on the island in 1836, and found no corner at C.; but James Wolfe, one of the plaintiffs, who was
*76] *present, said it had been there. John King proved that James Wolfe, a few years since, said there had been a corner on the island,


A
B
C
D
E
F
G
H
K
L
200 acres, granted to John Wolfe, 4th May, 1775, under whom the plaintiff's claim.
350 acres, granted to Joseph Robinson, 1st August, 1758.
Road.
Island.
Bull Swamp.

but it could not be found, and if so, his mother would hold all to Knott's line.

The grant to John Wolfe, on the line B. C., called for lands of the said John Wolfe, and the plaintiffs claimed to extend the line D. C. to L.; contending that the corner at C. not being found, they would go to the boundary called for. The only evidence that the land granted to Robinson ever belonged to Wolfe, was derived from the surveyor, Barrillon, who stated, that in locating a tract of land for one Mack, which was run in 1792, it called for this tract as Wolfe's; and McInnis also stated, that about 1826, he surveyed the lands of the estate of Joseph Wolfe, for partition among his heirs, and the Robinson tract was then Wolfe's. McInnis also said, in locating the John Wolfe tract then, he stopped at the corner C., and that he has since located a warrant in favor of one Wm. P. Wolfe, embracing the triangle, B. C. L., and other lands below on the swamp, and that a grant was, he believes, issued to said William P. Wolfe.

Barrillon and McInnis thought the corner at C. was never made; I D. A. Murphy said he would locate by the corners.

No marked tree was found on the line D. L., beyond the hickory at H.

*78] *Barrillon stated that he called on Pearson to show him where the pine corner stood; he pointed out a place near at hand, which did not, by a few yards, correspond with the distance. He then showed a pine log, fifty yards off, and said that he could not say exactly where the corner stood; he could not say if Johns made the corner, or found it, whether or they run an old line or not.

Barrillon found a line nearly corresponding with the line B. C., about forty-seven years old. The line B. E. is not a straight line, but makes a slight angle at K.

The jury were instructed, that if they thought the pine corner to be established by the evidence, the line D. E. must stop at C., where the pine originally stood. But if they thought that corner not established, they might extend the line to L.; that is, to the land called for by the grant to John Wolfe, and according to the opinion of Barrillon and McInnis. The jury found for the plaintiff, the land in dispute; and the defendant appeals:

1st. Because the plaintiff's lines should have been closed according to the corners and marked trees called for on his plat; all of which were either found, or accounted for.

2d. Because it was not proved, that any such boundary, as the one adopted by the jury, existed in 1775, when the plat of plaintiff was located.

3d. Because the finding of the jury was contrary to the law and evidence, and the well established rules of location.

Curia, per BUTLER, J. We are well satisfied, that the location adopted by the jury in this case, should not be sustained. It is not only against the evidence, but it violates the obvious principles by which the plaintiff's grant should have been located. The three corners, B. A. and D., are formed as called for in the plat; the fourth corner of the tract, though not called for in the grant, is represented on the plat, to be on an island, lying to the left, and in the neighborhood of Bull Swamp. The original surveyors certainly knew where the island lay, and intended the

lines running from B. and D. to intersect on it; and the course of both these lines would go to an island. On the line from D., a station is found at H., and the distance *called for would stop at C., on an island without crossing the creek. It could never have been supposed [*79 by the original surveyors, that the lines from B. and D. should cross Bull Swamp, before they intersected; otherwise they would have represented the creek as they did the island. To get to K, the creek is crossed twice, and the course from B. widely deviated from, and the distance from D. greatly extended; not only perverting the shape of the original plat, but making a corner where there was no island to be found; for it was not pretended that any island was found to the right of Bull Swamp. It appears to me clear, that the fourth corner must be located on an island, and that C. is on the very island represented and called for, as no other was found corresponding with it. This is a conclusion drawn from an inspection of the plats and grants, and is abundantly warranted by the positive, and, I think, satisfactory evidence of the witnesses, particularly that of Pearson. (*a*) In questions of location, juries will not be allowed by the Court, to commit palpable errors. We think the jury, in this case, has committed such an error, and, therefore, grant the defendant's motion for a new trial.

RICHARDSON, O'NEALL and EVANS, JJ., concurred.

T. W. Glover, for the motion. *Whitmore*, Solicitor, contra.

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*ALEXANDER YOUNG *vs.* JOHN A. KENNEDY. [*80

1. When a defendant, in an action against him as administrator, fails to plead "*plene administravit*," but rests his defence upon the plea of "*non est factum*," or some other plea, and a recovery is had against him on such plea, the judgment thus obtained is "*prima facie*" evidence to charge the administrator in an action suggesting a "*devastavit*;" and the return of *nulla bona* on the execution, is evidence of the same character.
2. The return of *nulla bona* is not conclusive, and the defendant is not precluded from showing that he had no assets of the intestate's estate to be administered.

Before BUTLER, J., at Kershaw, Fall Term, 1841.

This was an action of debt, suggesting a *devastavit*, so as to make the defendant liable for a debt which had been recovered against him, as the administrator of his brother, Andrew Kennedy. Plea, not guilty, and issue joined. In the action against defendant, as administrator, on a sealed note by his intestate, he pleaded "*non est factum*." This was the only plea. The jury found a verdict for the plaintiff, October Term, 1840. Judgment signed 31st October, 1840, and *fi. fa.* lodged same day, to make the money out of the effects of intestate, &c

Return by the sheriff, *nulla bona*. The plaintiff closed, contending that he had made a *prima facie* showing, that defendant had had in his possession assets to pay the debt, and had wasted them. A motion was

(*a*) Supra, 47. *An.*

made for nonsuit, upon the ground that plaintiff had not made a sufficient showing to recover in this action against the defendant. The Court overruled the motion, and the plaintiff took his verdict for the amount of his debt, &c.

The defendant moved to set aside the verdict, and renewed his motion for a nonsuit in the Court of Appeals, on the ground, that the showing of the plaintiff was not sufficient to entitle him to recover in this action against the defendant.

Mr. Smart, for the motion. 1st Saund. Note 8, 219; Rice's Rep. 219.

Mr. De Saussure, contra. States the question, whether the judgment recovered, and *nulla bona* returned, will charge the defendant. 1st At. 292; Bac. Ab. Tit. Ex'ors and adm'rs, let. M. *Givens* vs. *Porteous*, 1 McC. 379.

*81] *Curia, per* BUTLER, J. The precise point ruled on the circuit, and that upon which the judgment of this Court is now asked, may be thus stated: When a defendant in an action against him as administrator, fails to plead *plene administravit*, but rests the defence entirely on some plea denying the liability of the intestate, such as payment, or *non est factum*, &c., and a recovery is had against him on such plea, is not a judgment, thus recovered, *prima facie* evidence to charge the administrator in an action of debt, suggesting a *devastavit*? and if so, is not the return of *nulla bona*, on the execution in the case, evidence of the same character, to show that the assets which were administered, had been wasted? An affirmative decision of this proposition, does not deprive the defendant of an opportunity of showing that he had no assets of the deceased to be administered, or to show that he had not wasted them. Such a decision as that might, in this State, operate unjustly, as it might be in the power of the administrator to show that, instead of wasting the assets, as might be inferred from the sheriff's return, they had been taken away from him subsequent to the first trial, by the judgment of a competent Court; or, perhaps, that he had regularly disposed of them, according to law, to superior demands. (*a*) I am not, therefore, prepared to go so far as to say, that if an administrator or executor omit to plead *plene administravit* in the first action, and a verdict is had against him, it operates as a conclusive admission of assets; or that *nulla bona* should be held as conclusive evidence of *devastavit*. The English decisions would seem to go this far. In the case of *Erving's Executors vs. Peters*, 3 T. R. 685, the subject was fully considered. The defendant had been sued on a bond executed by his testator, and others, twenty-four years before suit brought. He put in a plea of payment, and a verdict was had against him on such plea; a *fi. fa.* was taken out on the judgment, commanding the sheriff to cause the debt and damages to be levied of the goods and chattels of the testator in the hands of defendant, if he had so much thereof in his hands to be administered, and if he had not so much, &c., then to cause the said *damages*, (*only*) to be levied of the

*82] proper goods and chattels of the defendant *himself. Upon this, the sheriff, after calling to his aid a jury to try the question, certified that no goods could be found, either of the testator, or defendant, in his bailiwick, (the same having been taken away,) to satisfy the debt or damages. This was all the evidence of a *devastavit* that was offered by

(*a*) See 1 Sp. 277. *Am.*

plaintiff. The Court held this sufficient, and, indeed, a conclusive admission of assets. Lord Kenyon struggled hard to free himself from the restraints of authority, saying it struck him as extremely hard on the defendant, but as hard as it was, he must submit to the law, as it had been settled by the current of authorities. His lordship further remarked, "that it seemed extraordinary, that the judgment in the first action, should not be a judgment *de bonis propriis*, if the executor be liable, at all events." Buller, J., had no such difficulties; but said the law was both well settled, and agreeable to reason, He concludes his judgment in the following terms: "Here, the simple question is, whether an executor or administrator, who has no effects in his hands to be administered, and will not take advantage of that defence at the proper time, shall be permitted to do it afterwards. Now, it is an universal principle of law, that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it, either in another action founded on it, or in a *scire facias*. According to these views, the defendant in the case before the Court, would be barred by the recovery in the former action, from setting up any defence in this. Although, in form, the judgment was against him to be satisfied, *de bonis testatoris*, yet, in effect, it would fix his absolute liability. I think in justice, however, he should not be placed in this situation. But he should be rather regarded as standing in the position of a defendant, who had pleaded *plene administravit*, with a finding of assets in his hands. In such a case, a judgment would be only good for the amount of assets found, although it would be a falsification of the plea denying any assets. In the foregoing decision, Lord Kenyon refers to the decision of Lord Mansfield on this point, in the case of *Harrison* vs. *Beckles*, "There, to an action of assumpsit, the defendant pleaded *non assumpsit* and *plene administravit*." It was insisted, that if the plaintiff could prove* [*83 assets administered to any small amount, the plaintiff must have a verdict for the whole of his demand. But Lord Mansfield said the law was certainly understood to be so, and there were a hundred cases so determined. This struck him as wrong and absurd; and after consultation with the other judges, it was agreed that the plaintiff ought not to recover of the executor, more than the assets in his hands The plaintiff proved two notes, which amounted to £80, and took verdict on the *non assumpsit* for that sum, and having proved £25 assets unadministered, he took a verdict on the *plene administravit* for that sum, and judgment *quando*, &c., for the residue."

In the case under consideration, I think it was competent for the defendant to have limited the verdict to the actual amount of assets which he had in his hands to be administered. It would be unjust to punish a defendant, who, as administrator, believed no debt was due, with the absolute payment of the debt; because he failed to sustain a plea put in, in good faith, such as payment, &c., denying the existence of the debt. But an omission to plead *plene administravit*, will, in all cases, raise the presumption that the defendant has assets sufficient to pay the debt; and, in a second action, suggesting a *devastavit*, a plaintiff should not be required to prove the assets, but the *onus* should be thrown on the defendant to relieve himself from liability, by either show-

ing that he had nothing to satisfy the judgment, or the extent of assets in his hands, &c. This the defendant refused to do, when he had it in his power to have made a satisfactory development of his administration. I presume, however, as well from the ground of defence taken by defendant, as from what was stated in argument, that he ought to pay the debt, and that the verdict is entirely correct. The judgment of the Court was founded in a most favorable interpretation of the law; and the defendant has no cause to complain. I would wish to limit the judgment to the point made, to wit: that the evidence to charge plaintiff was, at least, *prima facie*. The plaintiff might have contended, under English decisions, that it was conclusive. Until, however, the law is thus settled here, I shall be satisfied with the decision made on *the circuit, which being confirmed, the motion of defendant is refused.

*84]

RICHARDSON, O'NEALL, EVANS, EARLE, JJ., concurred.

See *Caldwell, Administrator of Charr* vs. *Micheau, Administrator of Brome*, 1 Sp. 276, holding the evidence conclusive. 2 Hill, 450. Rice, 323. *An.*

THE CAMDEN ORPHAN SOCIETY *vs.* JOSEPH LOCKHART, ET AL.

1. The statute of limitations, will run against the title to lands, claimed by a corporate body, such as the Camden Orphan Society.
2. Where a party enters upon land, as the tenant of another, he cannot dispute the title of the party, under whom he entered, by attorning secretly to a stranger.

Before BUTLER, J., at Kershaw, Fall Term, 1841, who reports the following statement of facts:

This was an action of trespass, to try titles to a tract of land, containing five hundred acres, lying on Deep Fork of Black river.

It appeared from papers on record, in the office of the Secretary of State, copies of which were given in evidence, that the land in dispute had been in a grant of forty-eight thousand acres, to Thomas Lowndes, made by the Lords proprietors, in 1721, and that the same lands had been receded by the grantee, Thomas Lowndes, to the crown, after it assumed the government of the Province of South Carolina. In 1775, Edward Lowndes, had the land in dispute, with several other tracts of five hundred acres, surveyed for him. The survey was made by one John Belton, D. S., and was recorded in the proper office. A memorial was also recorded in the same office, purporting to have been made by Edward Lowndes, and certified by the same John Belton, in which it is recited, that these lands had been granted to *Edward Lowndes, with a reservation of quit rent to the crown. No grant could be found in the land offices, as appeared by a certificate of the deputy Secretary of State and the deputy Surveyor General. The plaintiffs made the usual affidavit, that no such grant was in their possession. They relied upon the above statement of facts, to raise the presumption of a grant, and that it had been destroyed or lost, &c. The next piece of evidence, introduced by the plaintiffs, was a record, in which Royal Bullard, as Eschea-

*85]

tor of Kershaw district, asserts and declares, that Edward Lowndes died in 1790, in England, leaving no heirs in this country, who could hold the land—and that the same escheated to the State. Verdict of the jury: "We find the within lands described to be escheated." The verdict was certified by the presiding Judge, David Johnson, Nov., 1816. Upon these proceedings the clerk of the Court, as required by law, advertised in the public newspaper, that unless the heirs of Edward Lowndes came forward within a year, to establish their right to said land, they would be declared duly escheated, &c. By an Act of the Legislature, the title to the escheated lands of Kershaw district was vested in the Orphan Society of Camden, to the value of $9,000; and under this Act, as well as a title from Royal Bullard, Escheator, dated the 28th of October, 1823, the plaintiffs claimed the lands in dispute. Trespass admitted.

Upon the above statements, the defendants moved for a nonsuit, which I overruled, holding that there was sufficient evidence, to show that the State had *granted* the lands to Thomas Lowndes; that although no grant could be found in the land office, I thought the recorded memorial certified by Belton to have been made by Lowndes, was evidence, that the grantee was to pay quit rent to the crown, on the assumption of a grant; and I also thought that the presumption, that the grant, had been lost or destroyed, amid the confusion of a civil war, and the removal of the records, from one place to another, might well arise.

The defendants then went into their defence, which depended somewhat, on the evidence, that came out from the plaintiff's witnesses, (which will be noted hereafter,) and upon a grant to Isham Moore and David Reynolds. *The grant was dated the 7th May, 1786, and covered the *locus*. [*86

To establish possession under this grant, the defendants relied on the following evidence:

Daniel Scarborough said, that he married the daughter of Joseph Lockhart, in 1815; that Lockhart was then in the cultivation of the land; he spoke of it as the Lowndes land, but always said he held it, as the tenant and agent of Moore; never heard him say otherwise, in his lifetime; he died in 1829, and his son, Joseph Lockhart, one of the defendants, then took possession of the land, and held it as his father had done. The witness said, the first time he heard old Joseph Lockhart, speaking of his holding the land for Moore, was about a year or two after his marriage. He then spoke of himself, as Moore's tenant generally.

Angus McCaskill, said he knew Joseph Lockhart, Sen., in 1815; he was then living on this land, and died there. During Lockhart's lifetime, from 1815, witness often heard him say, he held the land for Moore, and was put there to take care of the land, and to keep off trespassers. The witness says he knows of Lockhart having bargained a part of the land for Moore, in 1826, to one Porter; and that Porter is now in the occupancy of the land so bargained, and has been, ever since his purchase in 1826.

The defendants closed, by proving that the defendants, in the record, were the representatives of Moore; their names having been substituted or added by order of Court, since the commencement of this suit.

By way of reply, the plaintiffs relied on the following evidence:

Obligation by Joseph Lockhart, dated April, 1821, to pay $10 rent to the Camden Orphan Society. The following entry appeared on the record of the Court of Common Pleas, for November, 1824: "*Royal Bullard, Escheator of Kershaw district* vs. *Jos. Lockhart:* trespass to try titles. Nonsuit."

Record of *Richard Moore* vs. *the Escheator of Kersham.* This was a suggestion on the part of Moore, setting forth, that the lands described were not subject to escheat, as had been declared in previous proceedings, but they belonged to him-

*87] self. This proceeding was let fall in some *way. William McWillie was sworn to make some explanations, relative to the above record. He stated, that he was counsel for Lockhart, in the suit of the Orphan Society against Lockhart, and procured a nonsuit on the production of the obligation, to pay rent before mentioned, and that the last case went off the docket because Moore supposed his title no longer in danger, and that it was not, therefore, necessary for him to go on with the suggestion.

The whole question in the case, as it went to the jury, was, whether the defendants, had a good title to the land, by the statute of limitations; which depended altogether on the character of Lockhart's possession I said to the jury, that if Lockhart had held for Moore, from 1815 to 1821, it gave Moore good title under the statute; and that in 1821, when it was said Lockhart acknowledged himself the tenant of the plaintiffs, he could not attorn to a stranger, without divesting himself of the relation of tenant of Moore, and giving Moore notice of the new relation he had assumed to plaintiffs. That if Lockhart had done so, he might then be regarded as standing in an adverse position to Moore, and might, by his subsequent possession, enable the plaintiffs to acquire a title under the statute of limitations, &c. The fact, that Lockhart bargained any part of the land for Moore, in 1826, would seem to show, that at that date, he regarded himself as the agent of Moore. The jury returned a verdict for defendant.

The plaintiffs' appealed and moved, for a new trial:

1. Because, by the written acknowledgment of Joseph Lockhart, Sen., in 1821, as tenant of the plaintiffs, and his obtaining a nonsuit against the plaintiffs, in their suit against him, in 1824, by setting up, and by virtue of the said instrument, the said Lockhart had openly thrown off his character as agent or tenant of Moore, if ever he was such tenant.

2. Because the suggestion filed by Richard Moore, on the 17th of April, 1824, was an admission that the said Lockhart was the tenant of plaintiffs.

3. Because Richard Moore, having failed to file his traverse of said escheat, *88] within five years after the verdict of *escheat, he is barred from now claiming, and the land then vested in the plaintiffs.

4. Because Moore, having failed to traverse the escheat, within the time limited, the attornment of Lockhart in 1821, made his possession, the possession of the plaintiffs.

5. Because from the legal proceedings had, the question of tenancy was one of law, not fact, and his Honor should have so charged the jury, and not left it to them to decide.

J. M. De Saussure, for the motion, Reads the acknowledgment of tenancy, 1821. Nonsuit in 1824, by the production of the written memorandum of tenancy. This is inconsistent with this verdict.

His defence, on the ground of this tenancy, was a renunciation of his defence under Moore, 5 Stat. at Large, 48, Escheats 3.

Within five years, party comes in and compensation.

Wm. F. De Saussure, contra. Was Moore a party to the inquisition of escheat? It merely applies to the heirs of the parties seized.

2 N. & McC. 570, note 373. Title acquired by tenant, cannot be set up.

Harper 70, *Love* vs. *Dennis*. Law Journal, 114, 125.

Quære. How can Lockhart's possession be adverse after the recognition of the plaintiff's title, by becoming their tenant.

Curia, per BUTLER, J. I shall regard this case here, as it was regarded on the Circuit. As a contest between the plaintiff and the

heirs of Moore. The grant under which the defendants claim, can avail them nothing, except as color of title, to indicate the extent of their possession. For it could have availed them nothing, during the lifetime of Lowndes, as the land was, at his death, in the actual possession of no one; and after his death, while the title was in the State by escheat, it was not the subject of grant. At Lowndes's death, the title being in the State, as was established by the proceedings is escheat; the Statute of Limitations(*a*) could not run against the State, in favor of Moore or *any one else. It may be assumed, as it is stated in the foregoing proceedings, that Edward Lowndes died in 1790. At that time, [*89 then, the right to the land, reverted to and was vested in the State, and was subject to be sold under the Act of 1787,(*b*) or to be disposed of, by any specific legislative enactment. By an Act of Assembly, passed in 1779,(*c*) the escheated lands in Kershaw district, to the amount in value of $9000, were vested in the Camden Orphan Society, which, as a corporate body, had power to sue for these lands, as fully as any natural person would have had, under a general grant. The plaintiffs having thus acquired this right, under a special Act of legislation, must be governed by the same legal principles, that would operate on other proprietors.

These general propositions are fully sustained by repeated decisions of our own State. The case of *Wilkins* vs. *Tart*, 3 McC. 518, establishes the point, that the Statute of Limitations will run against the trustees of an Academy, who had vested in them the title of escheated lands by a special Act of the Legislature. Not from the time of inquisition and office found, but from the time the title was cast upon or was acquired by the trustees.

Moore, by his tenant, Lockhart, took possession of the land in controversy in 1815, and held it adversely till 1821 without question. This was a period of six years and by the operation of the statute, he acquired a perfect title to the exclusion of all the world. The question then presents itself; has he been divested of that title by the adverse possession of plaintiffs after that time. From 1821, it is contended that the plaintiffs were in by the possession of Lockhart as their tenant. Whether Lockhart continued to be the tenant of Moore, or had become and was the tenant of plaintiffs, after that period was a question of fact that was submitted to the jury on the evidence. It does appear, that in 1821, Lockhart entered into an obligation to pay rent to plaintiffs. Whether he ever paid the rent for that year, or acknowledged his liability to pay it afterwards, did not appear. I think the evidence well warranted the conclusion, that after that year he continued to hold for Moore. For, in 1826, Lockhart actually bargained in the *name of Moore, part of the land to Porter, who is now in possession, under [*90 Moore's title. But I hold it out of the question that the plaintiffs could have availed themselves of Lockhart's possession to defeat Moore's title, unless it could have been shown, that Lockhart had assumed an open and hostile attitude to his original landlord. Having entered under Moore, he could not dispute his title by attorning, secretly to a stranger. The law will not allow the rights of a landlord to be prejudiced by the treacherous conduct of his tenant. Before a tenant can claim against his

(*a*) Supra, 70. *An.* (*b*) 5 Stat. 46. *An.* (*c*) 5 Stat. 363. *An.*

landlord he must give him open notice directly or by some decisive act, that the tenant is holding in his own right, or in that part of another. No such notice was given to Moore. On the contrary, he had every reason to believe that Lockhart was always holding in his right, Moore was not even made a party to any of the proceedings against Lockhart, and there was not the least evidence that he knew of Lockhart's having entered into any obligation to pay rent to plaintiffs. Upon this point we are well satisfied with the finding of the jury. The ground was taken, though I think not seriously insisted on, that after the land was sold, under the proceedings of escheat, the title of all parties having any claim to the same, was thereby and then, extinguished and barred. Upon reading the Act of 1787, it will be found, that these proceedings were conclusive alone, on the representatives of Lowndes, and could not affect strangers to them.

Motion refused.

RICHARDSON, O'NEALL, EARLE, and EVANS, JJ., concurred.

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*91] *WILLIS BENSON *vs.* M'BEE & ALEXANDER.
J. RICHARDSON *vs.* THE SAME.
J. HAWKINS *vs.* THE SAME.
E. HAWKINS *vs.* THE SAME.
S. TURNER *vs.* THE SAME.

Where grain, received at a mill as toll, was mixed up, and became the subject of traffic, between the defendants, each being part owner, and interested in the proceeds of the sale. It was held that they were partners, in that particular business.

Before BUTLER, J., at Greenville, Extra Court, August, 1841.

This was an action of assumpsit for grain sold and delivered to the defendants, as partners. The grain (wheat) was delivered to Alexander alone; but it was alleged on the part of the plaintiff, that it was delivered to him while he had charge of McBee's mill, and as the partner of McBee. The whole question in the case was, *whether Alexander bought grain on account of himself and McBee, as partners, or exclusively on his individual account?* This depended very much on the course of dealing with the public, and the fact, whether McBee had shared in the profits of wheat bought by, and delivered to, Alexander. It appeared by articles of agreement entered into by McBee and one Michael, dated 20th June, 1829, that the latter was to take charge of McBee's mill on Reedy River, near Greenville Court House, and was to have one-third of the tolls as a compensation for his services. The agreement contained a clause to the effect that Michael was at liberty to manufacture the wheat, arising from the tolls, into flour, and to sell it on account of McBee and Michael; the former to have two-thirds of the nett profits, and the latter one-third, and both to be liable for bad debts. (See the agreement, which is not before me.) This agreement continued in force till April, 1830, when Michael

quit the mill, alleging that he could make nothing by it, and Alexander took charge of it, under the same agreement, with a memorandum endorsed thereon, to this effect: that the said agreement was mainly to govern the parties. Some short time after, Alexander took charge of the mill, which was enlarged, by the addition of another mill-house. He commenced the purchase of grain, to raise and sell pork, &c., &c. For grain thus bought, he would give his individual *note, at some [*92 times, and at others would settle for it by giving credit to customers at the mill, on their action for flour, bran and pork sold to them. These accounts against such persons were kept in books, marked the books of McBee & Alexander. These accounts, thus kept against the dealers at the mill, were readjusted and settled in a book, purporting to be one between McBee & Alexander themselves. The books were kept with some complication and confusion, and will again, as they were on the trial, be referred to by counsel. They were called for, under notice by the plaintiff, and were relied on to show that McBee had received, in his settlement with Alexander, a share of the profits of pork, beef and flour, sold by Alexander, and that he had, thereby, recognized Alexander as his general partner in all the transactions of the mill. These books, and the following evidence, will put the Court in possession of the case.

Edmund Waddill said he had known the mill for many years—Alexander kept it for fourteen years—quit it at his failure, which occurred suddenly, some short time before the commencement of this action—has seen the parties settle frequently—McBee required an annual settlement of their accounts, and on such settlement, he would take two-thirds, and give Alexander one-third of the profits—the mill ground a good deal of wheat, and had many hired hands employed about it. A. co-partnership wagon and team were attached to the mill—it did the hauling for the mill. Besides the wheat arising from tolls, a great deal of other wheat was bought at the mill, which, as well as the toll wheat, was ground up into flour. This witness said that this was what was called a merchant mill, and that he thought it was the custom of such a mill to buy grain and manufacture it into flour, as well as to take toll. He said he did not know that McBee had ever purchased grain, or had sanctioned the contracts of Alexander for grain purchased by him.

Peter G. Gerard and T. Walker, Esqrs., and others, said they had paid off accounts for flour, bran, &c., which were presented to them in the name of McBee & Alexander. Gerard said he had paid such an account to McBee since the failure of Alexander. Walker said that McBee was *an attentive man to business, [*93 and lives not far from the mill.

Dr. Rabe said he wanted to buy seed wheat—forty bushels—and spoke to Alexander, saying he wanted Benson's wheat, as it had taken the prize. Alexander consented to let him have it. Witness called, but Alexander said that wheat was gone, but he would get more of the same kind. Witness called again, and got forty bushels of wheat, which he understood to be Benson's wheat. He gave his note, payable to McBee & Alexander—he was sued—and he paid the amount of the judgment to Luther McBee, son of defendant. A judgment on a note given by Felix Green to McBee & Alexander, was produced in evidence.

Samuel G. McClanahan once saw McBee holding his horse, and in conversation with Alexander, near the house of the latter. As witness approached, heard McBee say, I want you to borrow or get money for me, you can do it as well as I can. McBee was then going to his factory, and after making the remark, rode off. He was about fifteen feet off, when Alexander said to witness, can you let us have some money? or can you lend me some money? and said you can get my note, or McBee will give his note, or we will give our note; it is just as you please. Ultimately, witness let Alexander have $260, and took his individual note for it. That note has been frequently renewed. Once paid an account at mill for wheat,

made out in the name of McBee & Alexander—at another time he got some seed wheat, which was in hogshead, and which Alexander said was Benson's wheat. The price of the wheat, twenty bushels, was credited on Alexander's note. Rabe's servant was at mill, and got wheat at the same time, and of the same kind he did. Before the conversation above alluded to, which was four years ago, he had frequently let Alexander have money. Witness sold Alexander railroad stock.

John Hawkins says he was in the habit of carrying his wheat to the mill, and selling it to Alexander—Alexander owed him, at one time, as much as $2000—he would frequently have settlements with Alexander, when he (the witness) would
*94] produce his book, kept by his son, (the *witness being illiterate,) and Alexander would produce his book—the entries corresponded, and settlements were made by these books—that book looked like that produced in Court. (It was alleged by plaintiff that this was a different book from that in Court, and should be produced; but it was denied that there was any such separate book as that described by witness.)

Samuel Williams said that he drove wagon for his father, and hauled wheat from Benson's to mill.

Enos Williams said he was the regular wagoner of the partnership wagon and team—he was employed by Alexander, while he had charge of the mill, and since his failures he has been employed by McBee For four years witness was employed by Alexander, during that time he hauled a good deal of flour to Augusta—would sell it and pay over the proceeds of sale to Alexander. Sometimes he would haul other articles for different persons—once went to Tennessee with yarn, and other goods. The barrels of flour, which he hauled to Augusta, were marked "*Reedy River Mill, Greenville*"—this, the only mark. When he sold flour, he did so in the name of Alexander—once stored some in his name—never had conversation with McBee on the subject—got all his instructions from Alexander. Alexander charged McBee with two-thirds of the expense of trip—would charge him with two-thirds of corn, purchased with Alexander's money, or furnished by Alexander.

The following receipts and due bills were offered to establish the bill of particulars:

Receipt to Benson of one hundred and forty-three bushels of grain, delivered at mill, in March, 1840, signed and certified by Alexander to be true.

Due bill. Due Willis Benson, on settlement, $200, dated in 1837.

(signed) ALEXANDER.

Another due bill for $38, signed by same, dated 2d February, 1839.

William Choice was the attorney of McBee & Alexander—collected a note given by Limestone Springs Company, payable to McBee & Alexander—has paid accounts for pork, wheat, &c., made out in the name of McBee & Alexander. Before
*95] Alexander's failure, which was suddenly, *and while McBee was in Charleston, his credit was very good—the general impression was, that he was making money, and in thriving circumstances. Alexander gave $1500 for shares in the railroad company; they were sold at $140. He lost, while he had the mill, a woman and a boy. The witness said he had a note in his hand, payable to Hawkins, by Alexander, when it was presented for payment, Alexander said when McBee returned he would put his name to the note, which McBee, however, refused to do.

Jeremiah Cleveland sold corn to Alexander, who said part was for himself and part for McBee. Alexander gave his own note, and paid it. This corn was not Hawkins'.

John Hawkins says the corn sold by Cleveland was delivered to McBee's *driver*, and in McBee's own wagon.

W. Blasingame, the clerk, was once present when Alexander lent Col. Ware $1200. Cleveland got the note that was given for the money, and recovered judgment on it.

Jefferson Choice. McBee applied to him to get $500 of money which he had, belonging to William Choice. McBee said at the time, that he would have no occasion to borrow, if he could get the $800 coming to him out of the $1200 Ware note.

DEFENCE.

Peter Cauble says he always understood that Alexander kept mill for one-third of the toll grain, and that McBee was no further connected with Alexander than in the tolls. Witness, a blacksmith, did work for the mill, and charged the work to McBee. Witness has sold wheat to Alexander, and took his individual note. Both witness and McBee bought pork of, and sold hogs to Alexander. Witness always looked to Alexander for pay, when he sold wheat to him.

Alexander has sustained the following losses: by death of boy, worth $1200; by death of girl, worth $800. He (Alexander) had in his employment a man named Charles, who kept the keys. Charles' character was bad—he was a thief. Heard Alexander, in a bragging way, say he was making money at the mill—Michael left it, because he said he was sinking money.

Benjamin Dunham is the owner of a mill in Anderson. When he employed his miller, who was from North Carolina, he took him on the same [*96 terms that McBee employed his miller—had heard of the agreement, and sent for it to look at, and afterwards drew up an agreement of the same purport—understood before that McBee's miller was getting one-third of the tolls. It is not generally understood that a miller of a merchant's mill has a right to purchase grain and sell flour manufactured from it. The owner of a mill may, and sometimes does, purchase wheat to be ground up into flour for sale.

F. H. Macleod was in the habit of giving Alexander money to buy wheat for him, with instructions to have it ground up into flour—knows that Benson sent wheat to mill since Alexander's failure. Witness got some from Alexander, and saw Mr. Perry get some of the same.

Benjamin F. Horton has given Alexander money to buy wheat for him—generally would get about thirty bushels a year. He worked for McBee, and would pay his mill account by the account which he held against McBee.

John M. Roberts is one of the trustees of Alexander's creditors. Benson filed his demand, but has, as yet, received no part of it. Benson told witness to keep the money, when witness proposed to pay it over to him. He has paid several creditors thirty-three cents in the dollar.

Richard Ward, the overseer of McBee, knew that Alexander cut hay in McBee's meadow—all the hay he has ever had at mill, he thinks, came from the meadow.

Hardin Roberts keeps McBee's saw mill, and makes out accounts in the name of McBee & Roberts. Witness gets one third of the proceeds of plank sold, and McBee keeps the mill in repair.

Wm. Jacobs says his account was in note, given by Alexander, for money lent, corn sold to feed horses, &c. Alexander told him that he had let McBee have $3000 in gold and silver, as paper money would not answer, the exchange would be lost by such way, &c.

Samuel Bigham knows that McBee paid for machinary at the North—some paid for six years ago, and some two or three years ago—paid for some in gold, three years ago. Witness was a partner of McBee in a cotton factory, *and gave notes in the name of McBee, Allen & Co. McBee has a gold mine in North [*97 Carolina.

EVIDENCE IN REPLY.

John Richardson says he held notes against Alexander; on one occasion applied for money; Alexander paid him some in gold, and upon witness remarking that it was pretty money, Alexander said yes, he did not let it always go out; that he had up stairs a peck of such money. The witness had delivered at mill, wheat and barrels, and took Alexander's individual note, thinking it abundantly good, though he thought that McBee was in copartnership in all the mill business.

Various accounts were produced, in which money had been paid to Alexander, on accounts due Alexander & McBee.

The case was submitted to the jury, under instructions on the general principles of the law applicable to copartnerships. I held that, under the articles of agreement, McBee was a partner in the manufacture and sale of flour, arising from toll-wheat; that he had permitted himself to

be held out as a partner, to that extent at least, by the manner of dealing with the public. Accounts were made, and suits brought in the name of McBee & Alexander. I further said, that strangers to the subsisting contract, between McBee & Alexander, might hold McBee liable, as a partner, for grain delivered at the mill, when there was nothing to show that Alexander received and bought the grain on his individual account. In many instances, persons who had given their notes to McBee & Alexander, or who had accounts standing against them for flour, bran, &c., paid them off by the sale and delivery of grain at the mill. From this mode of dealing, such persons might well regard Alexander as acting within the scope of the copartnership between himself and McBee, upon the ground that the latter had made him his agent to make such contracts, and to transact the general business about the mill, on the faith of his name. This course of dealing was calculated to deceive the public. Notwithstanding it may have been the design of the parties to limit their
*98] partnership to the tolls, still it was competent for persons *to contract with Alexander, as to all matters not strictly embraced in the business of the farm. They could make him their agent to buy and sell wheat for them, or to do anything else with which they believed McBee was not interested. The rights of such persons could not, however, be destroyed by such a mode of trading, if they could show that McBee, in fact, shared the profits of such transactions. And it seemed to me, that was the point of view in which this case should be regarded; for one may subject himself to the liability of a partner, either by permitting another to use his name, where, in fact, he was not interested, or where his name is not used, by sharing the profits of the concern, under an agreement, expressly, or by implication, existing between the parties. This presented a question of fact: Did the plaintiff deal with Alexander in selling him his wheat, as the partner of McBee, from an honest belief that McBee, had permitted Alexander to use his name? or, if not, had he shown that McBee had shared in the profits of wheat purchased by Alexander? I was strongly inclined to believe that Benson had sold the wheat to Alexander, on his own individual responsibility. By his own showing he had taken notes signed alone by Alexander, and had filed his demand against Alexander, with a view to receive his share of the proceeds of his property. If this was so, I stated to the jury, that this case would be reduced to this simple point: Had McBee shared in the profits of wheat bought, and flower sold, manufactured from such wheat? There was no positive evidence on the point; it was a subject of inference, from the course of dealing in other matters. For instance, it was said, and I suppose established by evidence, that McBee had participated in the sale of beeves and pork, and some other articles, for which there was no express stipulation in the original agreement. The agreement limits the business of the concern to the flour manufactured from toll-corn. But the ground taken was, that in the progress of their business, the parties had enlarged the sphere of their partnership operations, and had extended them to the purchase and sale of all articles bought at, or arising from the mill. The books were mainly relied on to establish this. Whether this was the case, or not, was a question of fact, which I left to the jury.
*99] *The jury found for the plaintiff, $143, which was as much as I think he proved of his demand.

GROUNDS OF APPEAL.

1. Because his Honor, Judge Butler, instructed the jury that, by the articles of agreement, the defendants were partners.

2. Because his Honor instructed the jury, that if McBee received the profits of beef, pork, or other articles, sold by Alexander, they might presume he was a partner in the purchase and sale of grain.

3. Because there was no evidence that McBee participated in the profits of any grain, or other commodity, purchased and sold by Alexander, and the verdict is unsupported by evidence.

[These several actions were tried before EVANS, J., at Greenville, Fall Term, 1841, and one depending upon the same state of facts, before BUTLER, J., at the same place, August Term, 1841.

In order that the opinion of the Appeal Court may be more fully understood, the reports of their Honors, on the trials below, are given entire.]

Before EVANS, J.

These actions were all founded on contracts made with Alexander for the sale of grain, as wheat, corn, oats and fodder. In all of them, the main question was, whether there was a co-partnership between the defendants. McBee owned, at Greenville, a large mill, employed in general, as toll-mill. For many years, before 1830, one Michael had been the miller. The agreement between him and McBee was, that he was to attend the mill, and receive for his services one-third of the toll, and McBee two-thirds. Michael to sell McBee's toll, and if he chose, he could sell his own share along with McBee's; and if he did, they were to share the loss. Michael, besides the one-third of the toll, was to have the screenings. In 1830, Alexander succeeded Michael, and by an endorsement on the agreement of Michael, it was stipulated, the same contract, until another should be made, was to govern between Alexander and McBee. It appeared from the accounts rendered, and the books kept in the name of McBee* and Alexander, that various articles were charged as sold to customers, such as pork, pigs, cattle, [*100 flour, wheat, corn, salt, molasses and screenings; and that several customers were credited with corn, wheat, rye and fodder, in the mill books. It was contended by the defendants, that Alexander had mixed up his own private affairs in the mill accounts. It is very certain, that many of the articles charged to customers in the books, such as the screenings, pigs, salt, &c., were Alexander's private property; and these articles, although charged in the mill books, it was contended, were not carried into the settlements made by McBee and himself; but the books were kept in such a way, it was not by any means certain the facts were so. It appeared from the evidence of Mr. Benson, that in 1837, he sold to Alexander, wheat to the amount of two hundred dollars, and when he and Alexander settled for it by note, Alexander said he ought to pay interest, as he had sold the flour, and loaned the money on interest to one Ware. In relation to Ware's debt, it appeared that about $500 had been collected and divided between McBee and Alexander, in the ratio by which the profits of the mill were divided. The balance of the debt was transferred to Mr. Cleveland, but McBee claimed two-thirds of it. It also appeared, that in 1839, Benson sold to Alexander and delivered at the mill one hundred and forty-three bushels of wheat. A part of this wheat, it was said, was sold to Rabe, for seed, and charged on the mill books.

A note was afterwards given for Rabe's account, including the wheat, payable to McBee and Alexander, which note was sued, and McBee, after the failure of Alexander, received the money; but it did not appear he knew for what the note was given.

It also appeared from the evidence of Mr. Turner, that when Alexander applied to Hawkins for some corn, he said he had bought wheat of Brock; that the mill did not make enough to supply their customers; some of them were out, and there were many of them who looked to the mill for their bread, as he (Hawkins) did to his cornerib; it would take one more load to supply them. Hawkins, who was examined as a witness in the other cases, stated the same. Mr. Hoke proved that Alexander said he got wheat from Turner, at $1 37, or $1 50 per bushel; said
*101] he *was obliged to have it to supply their customers. Richardson, who was examined in Turner's case, said, Alexander, when he got some grain from him, said the mill was out, and could not supply their customers. It appeared also, that for many years, McBee & Alexander had a wagon on co-partnership, the profits of which were divided in the same ratio. This wagon hauled much of the grain which the plaintiff sold to Alexander. Large quantities of corn, oats and fodder were hauled and put in the crib, at Alexander's house. Alexander used out of it to feed his own stock, and sold to wagoners. The horses used to the partnership wagon, were also fed out of it; but the wagoner was directed to measure every thing he used for these horses, as Alexander said he charged McBee with two-thirds. The books showed regular settlements up to 1835, but none after.

It was fully proved, on the part of the defendants, that Alexander had sent off and sold at Augusta and other places, large quantities of flour, which had been sold in his name, with the proceeds of which, sometimes salt, sugar and other articles were purchased. These articles he sold to various persons, and some charges for them are found in the mill books; but Alexander told the wagoner he paid the same freight as was charged to other persons, and directed correct accounts of freight and expenses to be kept, as he had to account to McBee for his share of the freight of the flour and other articles transported in the copartnership wagon. It was clearly proved that Alexander bought wheat and other grain, as he said, on his own account, and ground it at the mill for his own benefit; that he was in as good credit as any man in that county; and one of the defendants, Richardson, said he would as soon have his money in Alexander's hands, as in the bank. No witness said he ever understood there was a general partnership in the buying of grain, or selling of grain, or flour, other than the profits of the mill. Very few knew anything of the terms on which Alexander kept the mill, and only one person had ever seen the agreement, and that only a short time before the failure.

There was no entry, in any of the books of the partnership produced,
*102] of the wheat, corn, &c., for which the *plaintiffs in these cases sued; but it appeared some leaves had been torn out of some of the books, and Benson said when he and Alexander settled, Alexander referred to a book for an account of his wheat. I did not, however, think that the condition of the books afforded any evidence that they had been mutilated to suppress anything for the defendants' benefit, yet the jury may have thought otherwise.

In Richardson's case, the action was on three notes, signed by Alexander, amounting to $576. They were counts for wheat sold and delivered. The proof established the delivery of four hundred bushels, on which $100 had been paid. Verdict for $300. There was nothing to identify the notes with the wheat delivered. In Hawkins' case, the course of dealing seemed to be, that Alexander bought, for several years in succession, the plaintiff's crop of wheat, amounting in all, the witness thought, to one thousand bushels, besides large quantities of corn, fodder and oats. The wheat was sent for by Alexander, and hauled to the mill—some by McBee & Alexander's wagon, and some by other wagons. The plaintiff kept an account, and at the close of each year's dealings, settled with Alexander, and took his notes. About January, 1839, he received $500 from Alexander, and some money before that time. The notes were consolidated, and one note for $1000 taken. The action was on this note, and another note for $90; all the notes were given for grain. Hawkins' son had some interest in the grain which was sold to Alexander, but was an undivided interest, and he had been paid by his father the amount of his share in the crops. I did not understand any note had been given to the son, but he cropped with his father, and was entitled to a share of the proceeds. The jury found for plaintiff, $1090, the amount of the notes. There had been a large payment made at, or about the date of the large note, more than enough to extinguish all interest, and I told the jury I thought if they did find for the plaintiff, they might give the amount of the notes, as the evidence proved a debt to that amount for grain.

In Turner's case there was proof of the delivery, in the same way as in the other cases, of wheat, corn and *fodder, to an amount much larger than the sealed note produced. After the evidence of delivery, Mr. Wardlaw exhibited a sealed note of Alexander's, and said the plaintiff claimed no more than the amount of it. It was not proved what the note was given for. It was, I believe, of later date than the delivery of the grain. It was of opinion, and so told the jury, that admitting the partnership to be proved, if the plaintiff had taken Alexander's sealed note for the grain, the open account was extinguished. There was a count on the declaration for the note. I thought that the production of the sealed note, under the circumstances, ought not to prejudice the plaintiff. The jury found for the plaintiff the amount due on the note. [*103

In Emory Hawkins' case, the proof was, the purchase by Alexander and delivery at the mill, of about fifty-four bushels of wheat.

In February, 1840, Alexander made an assignment of negroes and other property, to Mr. Roberts, for the benefit of his creditors. All the plaintiffs had presented their demands, and attended the meeting of the creditors. They agreed to accept their dividends, but not to release Alexander. The property had been sold and the dividends ascertained, but none of the plaintiffs had received their proportions; some had requested him to keep the money until these suits were decided. On the trial of the two first cases, nothing was said about deducting the plaintiff's proportion of these funds from the verdict, but it was inserted on the Turner case. I thought it ought not to be allowed, and so told the jury, as it was a payment on the sealed note, and not on account of the

grain. The demands presented to Mr. Roberts were notes, and, except in the Hawkins case, the consideration of the notes was not proved. The dividend was thirty-three and one-half per cent. Hawkins' dividend was $415 95; Turner's, $159 51; Richardson's, $215 71, and the dividend of Emory Hawkins, $17 16. It should be stated as a part of the case, that Alexander was McBee's brother-in-law, in whom he greatly confided, and that he seldom visited the mill. It appeared that he had been in copartnership with three other gentlemen in merchandise; that he never examined the books, and settled by the accounts as made out by his co-
*104] partners. It was *stated, the accounts charged in the books held by Alexander, in the name of McBee & Alexander, amounted, for two successive years, to more than $2,100, whilst the cash book, in which the settlements were made, never exhibited a larger sum than about $1,600, and generally less, as divided between them.

I was of opinion, and so charged the jury, that according to the articles of agreement, there was a copartnership in the sale of the grain received at the mill, as toll, but unless the copartnership extended beyond this, the plaintiffs could not recover. The extent and subjects of a copartnership, as between the parties, was ascertained by the article, but as these were secret, and known only to the partners, those who dealt with it could know the objects of the partnership only by the business that was transacted, and the things in which they dealt; and if the evidence was satisfactory, that the buying of wheat and other grain was a part of the regular business of the mill, carried on for the mutual benefit of the defendants, then McBee was liable. So, also, he would be liable, if he knowingly suffered Alexander to hold him out as a partner, and had thus obtained credit for the grain, on the partnership account; but of this I thought there was no evidence. The jury were instructed, also, that McBee would be liable, if the grain bought by Alexander from the plaintiffs was carried into the partnership account, and McBee did, in fact, receive his share of the proceeds of the sales of the grain and forage, so brought from the plaintiffs. In all the cases stated, the jury found for the plaintiffs. On some others, on grounds independent of the copartnership, they found for the defendants. I do not think any thing was said as to McBee's receipt of profits without notice. If the grain was bought for the partnership, and sold for its benefit by Alexander, and McBee received his share of the profits, if any, I thought his liability arose from participation in profits, or loss of that particular transaction, and his knowledge or ignorance was immaterial.

From these verdicts the defendants appealed in all the cases, because his Honor charged the jury that the articles of agreement, between the defendants, were a copartnership.

*105] *Curia, per* EVANS, J. It is objected to the charge of the presiding Judge, in these cases, that the jury were instructed, that by the articles of agreement, the defendants were partners in the sale of the grain received as toll at the mill. The elementary writers define a partnership to be, a contract between two or more persons, to place their money, effects, labor, and skill, or some, or all of these, in some lawful business, or traffic, and to share the profits and bear the loss in certain

proportions. 3 Kent Com., 23.(*a*) There is a class of cases, where a portion of the profits of a business may be given, by way of compensation for personal services; as in the case of an overseer, whose wages depends on the quantity of produce made, and the price for which it is sold; and of a clerk in a store, who receives, in lieu of certain wages, a share of the profits. But these persons are mere agents, with a contingent salary. They have no property in the things out of which the profits are to arise. Alexander had no interest in the mill, and so far as that was concerned, he was correctly styled in the articles as a miller; he was not McBee's partner in the mill; but when the grain received as toll was mixed up, and became the subject of traffic, each being part owner, and interested in the proceeds of the sale, I thought at the trial, and still think, that they were partners in that particular business. The lines which divide partnerships from other joint interests are very shadowy. None of the elementary writers have succeeded in making them out clearly; and as it would be an unnecessary investigation in this case; and, especially, as there is some diversity of opinion among my brethren, I do not propose to attempt, (if, indeed, the thing be practicable,) to lay down any rules by which to determine, in all cases, whether the articles make the parties partners, or not. As a general rule, it seems to me, that relation will exist, wherever there is a joint property in the thing sold, and a mutual interest in the result of the sale. The partnership, in these cases, if it existed, by the articles, extended only to the sale of the grain received as toll; it did not extend to the buying of grain, and the juries were expressly instructed, in all the cases, that McBee was not liable, under the articles, for the grain and forage purchased by *Alexander from [*106 the plaintiffs. The question of partnership, as between the defendants, was to be decided by reference to the articles; but as to others, to whom the articles were unknown, the question was to be decided by the ostensible business carried on in their name and for their benefit. It was very clear, from the evidence in these cases, that, besides toll-wheat and corn, Alexander carried on a traffic in wheat, flour, corn, and other articles, both in buying and selling, and some, at least, of these articles, were carried into the books of account kept in the name of McBee & Alexander, and were included in accounts rendered, and in notes taken in their name. From these facts, it was argued that a partnership, more extended than that embraced by the articles, did exist between these parties, in fact: extending to the buying and selling of wheat, corn, and the other articles embraced in the demands of these plaintiffs. I cannot say that the evidence, unexplained, does not admit of that interpretation. It was attempted to account for these circumstances, by showing, that everything besides the toll, was, in fact, Alexander's property; but instead of keeping a separate book for his own private dealings, whenever he let a customer of the mill have an article which belonged to himself, he charged it in the account of the purchaser, on the books of McBee & Alexander; but when he and McBee settled, these articles being his private property, were excluded from the settlement. That that was the fact with many of the things charged, such as screenings, pigs, pork, and beef, there was no reasonable grounds to doubt; and, in my judgment,

(*a*) See *Pierson* vs. *Steinmeyer*, 4 Rich. 316. *An.*

it was very probable that it was the fact in relation to the other things; but the books were kept so loosely, that I cannot say the jury were not authorized by the evidence to come to a different conclusion. And if from the proof, they were satisfied that a partnership existed between the defendants, extending to and embracing within its scope, the wheat, corn, and other things purchased by Alexander from the plaintiffs, then McBee is liable; and in this point of view, it is not material whether the plaintiffs trusted Alexander alone, or not, for if McBee was a partner of Alexander, and shared in the profits of the business carried on by him,
*107] he would be *liable, although his participation was not known to, or any credit given to him by, the plaintiffs; as he would then stand on the footing of a secret partner, and be liable as such.

Independent of the ground of actual partnership, there was some evidence that McBee participated in the proceeds of the sales of Renson's wheat; and also, that the wheat and corn bought of some of the other plaintiffs, was to supply the regular customers of the mill, and charged in their accounts; and the jury were instructed, that if the wheat and other articles, though bought on Alexander's credit, were mixed up with the wheat and corn belonging to the mill, and sold for the mutual benefit of McBee and Alexander, then McBee would be liable to the plaintiffs, on the ground of participation in the profits. Every partnership is more or less limited. None are so extensive as to embrace every thing; and one partner may carry on a separate business on his own account, in those things which the co-partnership does not embrace; and so long as he keeps it separate and distinct, so long it will be his own business; but when he mingles it with the co-partnership effects, and sells it for the mutual benefit of all the partners, and the proceeds of the sale is carried to their joint account, and the profits divided among them, then they will be liable in that particular transaction, on the ground of participation in profit. They have had the benefit of the thing purchased, and should be liable to the seller, because, by taking a part of the profits, they take from the creditors a part of the fund which is the proper security for the payment of the debts. (3 Kent 27, and the cases there referred to)

The only remaining ground of appeal which was urged in this Court, and upon which it is thought necessary to say any thing, other than what is contained in the report of the presiding Judge, is the second, in which it is claimed that the defendants should have had a credit for the sums in Roberts' hands, as the plaintiffs' proportion of Alexander's assigned estate. I do not understand that Mr. Roberts is the agent of the plaintiffs. He was the assignee appointed by Alexander to sell his property,
*108] and pay his debts, *pro rata*. The plaintiffs, it is true, *consented and requested him to act, but so long as the money remains in his hands, it is no payment to them. They have not consented to receive it as a payment of their demands against McBee and Alexander. On the contrary, some of them have expressly declined to receive it on that account. Besides this, as to a part of the plaintiffs, they have other demands than those recovered in these actions; and the proportion of Alexander's estate to which they are entitled, according to Mr. Robert's statement, is their proportions of their whole demands, and not the

proportion of what they have established in these cases, as a debt due by McBee and Alexander.

In reviewing the legal questions involved in these cases, I do not perceive the defendants have been able to establish their proposition, that there was error in the charge of the presiding Judge, on any of the legal questions involved. Four of these cases were tried before me, and I am free to confess, the evidence on the questions of partnership and participation of profits, was not such as to satisfy my mind of McBee's liability, but I cannot say there was no evidence from which the jury might not draw a contrary conclusion; I cannot, therefore, see how we can interfere with the verdicts, without trenching upon the legitimate province of the jury. I am willing, whenever called on, to take the responsibility of deciding the law of a case, and in general, to leave to the jury the undivided responsibility of deciding the facts.

In the consideration of these cases, my remarks have been more particularly directed to the four cases tried before me. Benson's case, which was tried before my brother BUTLER, does not vary in any material point from the others, and should share the same fate. The motions, in all the cases, are dismissed.

RICHARDSON, O'NEALL, and BUTLER, concurred. EARLE, J., absent.

(*a*) See 11 Rich. 105; 4 Rich. 309; 2 Strob. 471. *An.*

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*C. GLOVER, ASSIGNEE OF CRESSWELL, *vs.* R. HUTSON. [*109

Where there has been a breach of the warranty of a slave, and the party purchasing has been deprived of the slave, by a paramount title, the measure of damages, for the breach of such warranty, is the price paid for the slave.

[The right of action is not taken away by payment to the warrantee of the price which the slave, after having been taken from him was sold for; but the *quantum* of recovery may be thereby diminished. *An.*]

This case was tried before his Honor Judge Gantt, at Abbeville, Fall Term, 1840, who reported the facts of the case to the Appeal Court, but as they are sufficiently detailed in the judgment of the Court pronounced by EVANS, J., it is thought to be unnecessary to give more than is therein recited, which will be sufficient to a proper understanding.

Assumpsit for breach of warranty.

Curia, per EVANS, J. It is necessary that I should make a statement of the case in order that the opinion of the Court may be understood. In about 1837, the defendant Hutson sold to W. Cresswell a negro woman named Violet for the price of seven hundred dollars. At the time of the sale J. Wardlaw had an unsatisfied execution in the sheriff's office against Hutson for one thousand five hundred dollars. On the 15th October, 1838, Hutson recovered against Cresswell a judgment for seven hundred and sixty-one dollars and sixty cents, the amount of note and interest given for the price of Violet. Before the sale day in November, 1838, the sheriff of Abbeville, by the direction of Wardlaw, levied his

execution upon Violet as the property of Hutson. At the same time he had in his possession Hutson's execution against Cresswell and perhaps others. These were levied on all Cresswell's other property. The rest of the property levied on the sheriff took into his possession, but left Violet with Cresswell. At the sale day in November all the property was sold according to the levies; that is Violet was sold as the property of Hutson to satisfy Wardlaw's execution, and the rest of the property was sold to satisfy the cases against Cresswell. On the 13th November which was a few days after the sheriff's sale, Wardlaw directed the sheriff to apply the proceeds of the sale of Violet, to wit, three hundred dollars, to the satisfaction of the cases against Cresswell, and on the 15th November, the amount of Hutson's execution against Cresswell for the price of Violet was paid to Wardlaw, in part of his case against Hutson. At October term, 1838, Charles J. Glover, the plaintiff, recovered a judg-
*110] *ment against Cresswell, and on the 28th of October, Cresswell was arrested on a *ca. sa.* at the suit of Glover, and in order to obtain his discharge under the prison bounds' Act he assigned to Glover amongst other things as follows "a chose in action or demand against Robert Hutson of seven hundred dollars, being the price of a negro woman bought by William M. Cresswell of the said Robert Hutson, which slave was afterwards sold by the sheriff under a *fi. fa.* against Robert Hutson and as his property, at the suit of Joseph Wardlaw." It was to recover this demand founded on an alleged breach of the warranty of the title of Violet that this action was brought. On the trial of the case at Abbeville before Judge Gantt, he was of opinion, and so charged the jury, that by the sale of Violet, as Hutson's property, there was a breach of warranty, for which the plaintiff was entitled to recover back the whole purchase money; but the jury with a view to do justice between the parties, found a verdict for about three hundred and fifty dollars, thereby deducting from the price of Violet, the sum for which she was sold by the sheriff, and probably a small balance due on Hutson's execution against Cresswell. From this decision the defendant appeals on several grounds, but they resolve themselves into this: that there is no such breach of the warranty as will entitle the plaintiff to recover. The plaintiff also appeals, because his verdict is far less than the whole price which Cresswell paid Hutson for Violet, but he is content to let the verdict stand. If the sum for which Violet was sold by the sheriff, to wit, three hundred dollars, had been applied to the satisfaction of Wardlaw's execution against Hutson, I think there could be no doubt but that this would have been a breach of the warranty. It is equally clear that it was the duty of the Sheriff so to apply it, and that he would have done so but for the subsequent order of Wardlaw. Now if Wardlaw five or six days after the sale could defeat Cresswell's action, I can see no reason why he might not do it at the end of as many weeks or months, and this would put it in the power of Wardlaw at any time to determine whether the sale of Violet was or was not a breach, and thus Cresswell's right of action would depend on the volition of another and not on himself.
*111] Suppose Cresswell's other property had paid *all the cases against him and there had been no case to which the three hundred dollars could apply; would he be obliged to take this money if Wardlaw should abandon his right to it? I presume this proposition can hardly be main-

tained. Under the warranty Cresswell was entitled to have the negro, and if deprived of her by any paramount title or lien, he was entitled under the law of this State, to have his money paid back as the measure of damages. But it is said Cresswell was in failing circumstances and the sheriff had executions against him which he might have levied on Violet. This may have been the case; and it is probable that the sheriff would have so levied these executions, but he did not do so. He levied and sold under Wardlaw's execution, and we cannot know that she would have been sold if Cresswell had been left to contend with his own creditors. He might have made some arrangements to save her; or if she had been sold, so that his creditors were to receive the money, she might have brought more than she did; which was less than half of what Cresswell paid for her. It may be that the very fact that by the levy, she was abstracted from Cresswell's means of paying his debts, may have drawn down his creditors upon him at that time. Upon the whole, it seems to me the sale under Wardlaw's execution was a breach of the warranty, and it did not depend on Wardlaw's will to determine whether Cresswell should recover back the purchase money or not. The fact that Hutson [Cresswell? *An.*] has had the benefit of the sum for which the sheriff sold Violet, would seem in justice to reduce the damages by that amount, and as the jury have allowed it, and the plaintiff is content with the verdict, this Court is not disposed to interfere. The motion is dismissed.

RICHARDSON, EARLE, and BUTLER, JJ., concurred. O'NEALL, J., dissented.

Burt and *Thompson*, for motion. *Wilson*, contra.

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*S. M. DALRYMPLE *vs.* WM. LOFTON.(*a*) [*112

1. In an action of slander, where the words spoken, were, that the "plaintiff had sworn falsely in giving evidence, before a certain Justice Johnson, in a trial heard before him," it is not necessary to aver in the declaration, that the justice had jurisdiction of the cause in which the plaintiff was sworn as a witness, or that his testimony was material. Both of these are presumed, until the contrary appears.
2. If there be a *colloquium* [prefatory averment, *An.*] referring to the trial of a cause before a Justice, in which the plaintiff was examined as a witness, and in it, it is averred, that the defendant, speaking of such trial and testimony, spoke the same words, they would be actionable. They impute a false swearing, in a court of justice, which *prima facie*, imports perjury. If these general facts so averred be proved, it is enough on the part of the plaintiff.
3. It is the right and duty of a Judge, to instruct the jury fully upon the law arising out of the facts proved—and in an action of slander, where the defendant had charged the plaintiff with having sworn falsely before a Justice, in a certain trial in which the plaintiff was examined as a witness, the defendant, on the trial of the case, had the right to have the jury instructed, whether the evidence of the plaintiff before the Justice, was immaterial to the point in issue or not. And upon the refusal of the presiding Judge so to instruct the jury, a new trial was granted.

(*a*) S. C. again, 2 Sp. 588. *An.*

Tried before GANTT, J., at Newberry, Fall Term, 1840, who reports the facts of the case as follows:

This was an action of slander, in which the jury gave a verdict for the plaintiff. The declaration contained several counts. That a suit had been tried before Jesse Johnson, Esquire, a justice, wherein William Lofton, adminstrator of James M. Dillard, was plaintiff, and Jeremiah Joiner was defendant. That in the trial of the said case, the plaintiff, S. M. Dalrymple, was sworn as a witness, and gave testimony, and that it was in reference to the testimony thus given by the plaintiff, before the magistrate on said trial, that the defendant said he had not sworn the truth, that he had sworn falsely, as alleged in the declaration, and that the defendant meant to charge the plaintiff with having perjured himself.

The defendant relied on the plea of the general issue, and that alone. Very many witnesses were sworn in the case, and when the evidence closed, the counsel for defendant moved for a nonsuit, on grounds similar to those taken in the grounds of appeal,—which were overruled. The Court had previously overruled the going into evidence, to show *113] what was proved before the magistrate, *and that, too, on an objection properly raised on the part of the counsel for the defendant.

I did decline to charge the jury as I was requested to do, because I was of opinion that the facts involved in the issue made up, were whether the words alleged in the declaration to have been spoken, were proved, and whether the meaning given them by the innuendo, was correct; advantage, (if any could be taken,) for defects or omissions in the declaration, must be, by pleading specially, and not having been specially pleaded to, they were admitted to be true; all allegations material in a cause, which are not traversed by the defendant, are admitted to be true, and for these, judgment by *nihil dixit* may be entered up by the plaintiff. The grounds of objection noticed in this appeal, appear to me to be either on matters immaterial and irrelevant to the issue, or such as were falsified by the evidence which was offered.

I quote the following authorities, as illustrative of the law, applicable to this case, viz.: Selwyn's N. P., p. 1160, Mid., 1164 and 1166.

In the case of *Niven* vs. *Munn*, 13 Johnson's Reports, 48, where, in an action like the present, and a verdict for plaintiff, it was attempted to arrest the judgment on the following grounds: 1st. That it is not expressly averred that the testimony of Niven was in a cause, in which the justice had jurisdiction; and 2ndly, it is not expressly stated, that the testimony spoken of was upon a point material in the cause—the motion failed, and the plaintiff had judgment. The two cases are very similar as to the facts, and the case quoted, shows that if the declaration in the case at bar was less full in its statements, still the omission would not be fatal.

The defendant appeals, and moves for a *nonsuit.*

1. Because the averments alleged that the plaintiff was sworn as a witness for and on behalf of the defendant, on the trial before the justice, which was not proved as alleged.

2. Because it appeared, by the evidence of the plaintiff, that the testimony of

the plaintiff, before the justice, in *relation to which he was charged with false swearing, was not material to the point then in issue. [*114

3. Because the words proved did not support the words laid down in the declaration.

For a new trial.

1. Because his Honor refused to charge the jury (on being specially requested so to do,) that if the evidence given by the plaintiff, before the justice, was immaterial to the point in issue, that the action could not be sustained, giving as a reason, that the objection should have been made by the pleadings.

2. Because it fully appeared by the testimony, that the evidence given by the plaintiff before the justice, was immaterial to the point in issue, which was a question of law, on which his Honor refused to charge the jury.

3. Because his Honor held, that under the pleadings, the defendant could not show that the evidence given by the plaintiff before the justice, was immaterial to the point in issue, inasmuch as the defendant had pleaded the general issue.

4. Because his Honor permitted the plaintiff to prove the contents of what the plaintiff had sworn before the justice, (although not alleged in the declaration,) and afterwards refused to decide or charge that it was material, or immaterial to the issue before the justice.

5. Because his Honor charged the jury, that the declaration contained a sufficient allegation of the cause of action, and that the evidence fully sustained the counts therein, and that the only question for them was the amount of damages.

And in arrest of judgment.

1. Because there was no averment in the declaration that the justice before whom the plaintiff, in this suit, was sworn, had jurisdiction of the cause, and that the evidence given by the plaintiff on that trial, was material to the point in issue.

2. Because the declaration of the plaintiff in other particulars, was wholly insufficient, in law, to warrant the finding of the jury.

**Fair*, for the motion. Cited 1st Hawk. 218, 223; 1 McMull. 499, *Hamilton* vs. *Langley*. He contended that the plaintiff was bound to show the materiality of the testimony. [*115

Take, said Mr. F., the evidence of Esquire Johnson, and the testimony was shown to be immaterial. Cited 20 J. R. 341; cannot recover where immateriality appears. Cited also, 13 J. R. 81; 20 *ib.* 344; 9 Cow. 31; 1 Wend. 475; 12 *ib.* 500; 16 *ib.* 450.

Pope and *Caldwell*, contra. Cited 5 J. R. 188, as to actionable words; 1 Bail. 595, words explanatory; Starkie on Lib. 85, 86; 11 Wend. 38; 16 do. 450. The burden rests on the defendant, to show the immateriality of the evidence.

[Note.—The declaration, or a copy, to make this case more intelligible, should accompany the report of this case—but the Reporter has never been furnished with one, and consequently cannot publish it.—*Rep.*]

Curia per, O'Neall, J. This was an action of slander, for words spoken. The declaration sets out, by way of inducement, that a case had been pending before and tried by Jesse Johnson, one of the Justices of the quorum for Laurens district, in which the defendant, as administrator of James M. Dillard, deceased, was plaintiff, and Jerry Joiner was defendant; and that this plaintiff, on the trial of that case, was examined as a witness; and that the defendant, in a conversation of and concerning that suit, and of the testimony given by the plaintiff, said, "you did not swear the truth in the case of myself, administrator of James M. Dil-

lard, deceased, and Jerry Joiner;" "you swore falsely before Jesse Johnson, Esquire, on the trial of the case of myself vs. Jerry Joiner;" "you swore a lie before Jesse Johnson, Esq., on the trial of the case of myself and Jerry Joiner." These words were also charged as uttered in the third person; and other words of similar import, were also charged. There was no averment in the declaration, that the Justice had jurisdiction of the case, or that the testimony of the plaintiff, to which the words referred, was material to the point in issue before the Justice. On the trial in the first instance, when the plaintiff was about going into proof
116] of the testimony given by him, and as to which the words were spoken, the defendant's counsel objected to the proof, on the ground that there was no averment of the materiality of such testimony in the declaration, and hence no such proof could be received. This objection was sustained, on the ground that it was wholly immaterial whether the testimony was or was not material. In a subsequent stage of the case, it, however, appears, that Esquire Johnson stated the plaintiff in answer to a question put by the defendant, "whether the $15, the subject matter of the suit, was placed in the store of Dillard & Dalrymple?" answered, "that it was not, that he knew of." At the close of the plaintiff's case, a motion was made for nonsuit, on various grounds, which have been again urged in this Court. In the defence, the fact that the plaintiff proved before the Justice, and about which the defendant alleged the false swearing, was brought out from John C. Johnson, who said the question asked of the plaintiff was "whether the $15, for which Joiner held the receipt against the firm of Dillard & Dalrymple, had gone into the lower firm?" "Dalrymple said, not as he knew of." From the pleading and the testimony, I suppose that Joiner was sued on a demand which he owed to Dillard alone, and that he set up, by way of discount or payment, the receipt of Dillard and Dalrymple, for $15. Thus stated, we can see and understand what was perhaps the issue before the Justice, and the application of the proof. The defendant contended that the testimony given by this plaintiff, and of which he spoke, was immaterial, and hence, that in law, there was no slander. The presiding Judge held, that the words imputed perjury, and whether the testimony of the plaintiff was material or not, on the trial before the Justice, was a wholly immaterial question; and declined to charge the jury that "if the evidence given by the plaintiff was immaterial to the point in issue, that the action could not be maintained." The jury found a verdict for the plaintiff of $500 damages.

The grounds taken in arrest of judgment, cannot avail the defendant. It is very clear, on authority, that it is not necessary to aver in the declaration, that the Justice had jurisdiction of the cause in which the plain-
*117] tiff was sworn *as a witness, or that his testimony was material. Both of these are presumed, until the contrary appears. 2 Blackford, 242; *Niren* vs. *Munn*, 13 J. R. 48; *Chapman* vs. *Smith*, 13 J. R. 78; *Crookshanks* vs. *Gray*, 20 J. R. 344; *Hamilton* vs. *Langley*, 1 McMull. 498. This last authority is indeed decisive of the grounds in arrest of judgment, for it is the judgment of our own Court of Appeals, in December, 1835, upon the points now made.

The 1st ground of nonsuit cannot help the defendant. The testimony is not explicit that this plaintiff was sworn as a witness for the defendant, in the cause before the Justice, but it may be, for aught which appears

on the Judge's notes, that such was the fact, and after verdict, unless it be plain that no such testimony was given, it is in vain to ask for a nonsuit. The 3d ground for nonsuit was not argued here; and we may, therefore, conclude that it was intended to be abandoned. If, however, it was not, it is only necessary to refer to the Judge's notes, to see that the words were, in substance, proved as laid. The 2d ground of the motion for nonsuit and all the grounds for new trial relate to the same question, whether the materiality of the testimony given by the plaintiff to the issue before the justice was, in any shape, or by either party to be inquired into on the trial of this case.

There is a wide distinction between words, which in themselves import a crime, and words, which in themselves have not that meaning; but which have that effect by their reference to some extrinsic circumstances. In the first class, if the person uttering the words does not, at the time, add other words, which apply them to a transaction out of which no crime could arise, or if the witnesses do not understand them as so applying, then no matter to what subject the party speaking really intended to apply them, the words are actionable. *Pegram* vs. *Styrom*, (1 Bail. 595.) In the second class, the words are actionable by being connected with the extrinsic circumstances, which raise the belief that a crime was imputed. To say of one "you swore a lie before Esq. Lampkin," without a colloquium is not actionable.(*a*) For it may be that the oath was extra judicial. But if there be a colloquium, referring to a trial of a cause before a justice in which the plaintiff* was examined as a witness, and in it it is averred that the defendant speaking of such trial and [*118 testimony spoke the same words, they would be actionable. For under such circumstances, they impute a false swearing in a court of justice, which *prima facie* imports perjury. If these general facts so averred be proved, it is enough on the part of the plaintiff. For, as was said by my brother Earle, in the case of *Hamilton* vs. *Langby*, "the presumption is, that what a witness swears is material, and if the defendant expects to avoid a recovery on that ground, he must show that *the particular oath charged to be false was on an immaterial point.*" If the defendant cannot show that in point of fact, no perjury could have been committed in the transaction to which he alluded, then, he is answerable for the legal consequences of slander, no matter what might have been his intention. But if the defendant can show, that perjury could not arise out of the transaction to which he alluded, then, I think, he will have shielded himself from the consequences of his rash speaking. For the ground on which the action of slander for words actionable, *per se*, proceeds is, "that if true they would subject the plaintiff to infamous legal punishment."(*b*) If the defendant is able to show that even if his words be true, that yet no crime could exist, how can it be pretended that the plaintiff in slander can be entitled to recover damages when the ground of the action is removed? To affirm this question a person must believe that a building can stand after the foundation has been swept away. By way of illustration, let us suppose, that the defendant could show, that Mr. Justice Johnson, who tried this cause and whose jurisdiction is limited to matters of contract, had issued a summons in slander, and that the

(*a*) 2 N. & McC. 364. *An.* (*b*) 10 Rich. 118. *An.*

plaintiff, on the trial of that case, had been examined as a witness, and that it was of his testimony thus given the defendant spoke, when he uttered the words, would not such a showing as satisfactorily show, that there could not arise an imputation of perjury from the words spoken, as would be the case, if the plaintiff, as a witness, had never been sworn or examined? I think so. For if the justice had not jurisdiction in law, there was no suit, no oath, no examination. So if the testimony given
119] was clearly immaterial to the issue, it follows that, as one of the ingredients of perjury is wanting, the plaintiff's words, although *prima facie* importing a crime, yet, when sifted, cannot have that meaning, because out of the matter to which they referred there could not be perjury.(a) I should hence conclude from general reasoning, that the defendant might inquire as to the materiality of the testimony given by the plaintiff on the trial before the justice, and show, if he could, that it was wholly immaterial. This I think consistent with all authority.

In *Palmer* vs. *Bogan*, So. Ca. Rep. (Cheves,) 52, (which is very imperfectly reported, and which will, I hope, be more fully done in a note to this case,) the defendant argued, that he was entitled to a nonsuit, on the ground, that the materiality of the plaintiff's testimony, to which the defendant's words referred, was not shown. The Court, in the opinion, did not contest the ground, but showed that the materiality was sufficiently established. The plaintiff's testimony in that case was given in the Court of Common Pleas, and we all *then* thought, that it was sufficient for the plaintiff to show that in fact a suit was tried in the Common Pleas, in which the plaintiff was sworn and examined as a witness: but as it was unnecessary for the decision of that case to give that opinion, it was withheld. That opinion is, however, consistent with this. For there, there was no attempt on the part of the defendant to show the immateriality. His complaint was, that the plaintiff's proof was not enough to go to the jury.

I have referred to the case from 2 Blackford's Rep. 242; and it is fully to the point, that if the materiality be not shown by the plaintiff, it is not a ground of nonsuit, and so far, I fully agree with it. There is nothing in it which impinges the doctrine that the defendant may inquire as to the immateriality, and if it is made out by the defendant, that it would be a good defence. In *Chapman* vs. *Smith*, 13 J. R. 78, the great Judge, (Mr. Justice Spencer,) who delivered the opinion of the Court, after overruling the objection that the Justice's jurisdiction was not averred in the declaration and the objections to the verdict, states the precise rule for which I am contending. "On the trial (he says) it would have been competent to either party, to inquire in reference to
*120] what part of the *evidence given the words were spoken; and if it had appeared that they were spoken of evidence entirely immaterial, it is not to be presumed that the plaintiff below would have obtained a verdict." *Ibid.* 81. In *Crookshanks* vs. *Gray*, 20 J. R., 344, the precise point was made, and decided. Woodworth, J., speaking of it said, "on the trial of this cause it was competent to either party to inquire, in reference to what part of the evidence given, the words were spoken, and if they were spoken of evidence entirely immaterial,

(a) See 2 Sp. 7. *An.*

the plaintiff cannot recover." *Ibid*, 349. In *Power* vs. *Price*, 16 Wend. 450, in a note, the Chancellor states the rule to be, "where the words spoken are such as naturally to make the impression upon the minds of the hearers, that the party spoken of has been guilty of the crime of *perjury*, it is not incumbent upon the party prosecuting an action for the speaking of such words, to prove affirmatively that the testimony given by him was material, but the burden of proving its immateriality, and that there was no intention to impute the crime of perjury, rests with the defendant." After these authorities, the rule for which I am contending may be considered as definitely settled. It only now remains to apply it to this case. The defendant, under it, has no pretence to call for a nonsuit. The case was *prima facie*, made out by proof of the publication of the words, in reference to the trial before Esquire Johnston, in which the plaintiff was examined as a witness. If it had appeared from the plaintiff's proof, that the testimony was to an immaterial point, then the plaintiff ought to have been nonsuited. But it is not clear, from the proof of the magistrate, (which was the testimony on the part of the plaintiff,) that such was the fact. In a subsequent stage of the case, and on the part of the defendant, it may be, that the proof under the pleadings showed that the testimony could not have been material; for it is plain, that the case before the Justice, from the statement in the declaration, was in the right of Dillard alone, while the proof given, applied to a defence which could only be legally set up against Dillard & Dalrymple, or Dalrymple, as survivor of the firm. This was, however, to be considered by the jury; and the defendant had, therefore, the right to have *them instructed, that if they believed the fact to be that the testimony given by the plaintiff, and to which the defendant's words [*121 referred, was immaterial, that then they could not be regarded as legal slander. In *Christie* vs *Cowell*, 14 Petersdf. Abr. marg. p. 683, the words were, "he is a thief, for he has stolen my beer." "It appeared that the defendant was a brewer, and that the plaintiff had lived with him as a servant, in the course of which service he sold beer to different customers of the defendant, and received the money for the same, for which he had not duly accounted. Lord Kenyon directed the jury to consider whether these words were spoken in reference to the money received and unaccounted for by the plaintiff, or whether the defendant meant that the plaintiff had actually stolen beer; for if they referred to the money unaccounted for, that being a mere breach of contract, the word, thief, would not make it actionable." That case, perhaps, goes beyond what I think the true rule as to words, in themselves, imputing a crime. For in such a case, there must be something to qualify the legal sense of the words attending their publication Yet, where the words, as in this case, depend upon something extrinsic to make them slanderous, it furnishes the true and proper rule; for, in such a case, it is for the jury to say, whether the words applied to immaterial testimony, and if they did, they should have been told, as Lord Kenyon told the jury, in *Christie* vs. *Cowell*, that they were not actionable. This instruction the presiding Judge refused to give, supposing that under the pleading, the question, whether the testimony given by the plaintiff before the Justice, was immaterial, could not arise. In this he was clearly mistaken; for the question arose on the proof, not on the pleading. And, as in every other

case going to a jury, the parties are entitled to have them fully instructed upon the law arising out of the facts proved. This was not done, and, as a matter of right, the defendant is entitled to a new trial, the motion for which is, therefore, granted.

RICHARDSON, EVANS, EARLE and BUTLER, JJ., concurred.

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*122] *GEOFREY PALMER *vs.* M. B. BOGAN.

Decided December, 1839. *Opinion by* O'NEALL, J.

The ground in arrest of judgment cannot avail the defendant, for it was admitted on the argument, that two of the counts in the declaration were, beyond all doubt, good.(*a*) Where some of the counts are good, and some bad, the verdict is referred to, and stands upon the good counts. *Neall* vs. *Lewis*, 2 Bay. 204.

The ground for nonsuit is equally unavailing. The defendant, according to some of the proof, said that "the plaintiff swore a lie" in the case of *Bogan* vs. *Sumner*. To one of the witnesses he said this was done to injure him. To others he pointed to the particular evidence, the difference between him and Grice, in their testimony in the same case. In more than one of these conversations, he said Herndon said, in open Court, Grice or Palmer swore a lie, and there, pointing to Palmer, is the scoundrel. The proof was clear, that Palmer was examined as a witness for the defendant, Sumner, in a case in the Court of Common Pleas for Union district, between M. B. Bogan, plaintiff, and Mill Sumner, defendant. On this testimony, I refused to nonsuit the plaintiff, and I still think that I was right, and in that opinion my brethren concur. Let it be conceded, that in the declaration should be stated, not only the colloquium about the suit, and that the plaintiff was examined as a witness, and about his evidence given on the trial, but that it should also be alleged, that such evidence was on a point material to the issue, and that the defendant, speaking of and concerning it, uttered and published the words. All this is done in the declaration, and the only question is, was the materiality shown? We all think it was abundantly shown by the facts, 1st; that the witness was examined in defence of a case, in the Court of Common Pleas: 2d, that the defendant said the testimony was falsely given to injure him. 3d, that the defendant, here, (the plaintiff here,) contradicted the plaintiff's testimony by examining Grice. 4th, that a lawyer, learned in the law, (according to the defendant's account,) should have commented on the difference between Grice's and Palmer's testimony, and used the harsh expression that Grice or Palmer swore a lie, and there, pointing to Palmer, is the scoundrel. These four circumstances abundantly prove the materiality of the alleged false swearing, which is all that the defendant's counsel demanded, and I am not disposed to follow him an inch beyond the point necessary to be decided. The Court are satisfied with the charge to the jury. We are also satisfied that the Judge below exercised a proper discretion, in excusing the foreman of the jury, Mr. Sims, and in ordering the case on. The motions in arrest of judgment, for nonsuit and new trial, are dismissed.

GANTT, EVANS, EARLE, and BUTLER, JJ., concurred.

(*a*) 3 Strob. 341; 2 Hill. 654. *An.*

See next preceding case. *An.*

CASES AT LAW

ARGUED AND DETERMINED IN THE

COURT OF ERRORS OF SOUTH CAROLINA.

Columbia, December, 1841.

PRESENT

HON. DAVID JOHNSON, Chancellor.
" WILLIAM HARPER, Chancellor.
" JOB JOHNSTON, Chancellor.
" BENJAMIN F. DUNKIN, Chancellor.
" JOHN S. RICHARDSON, Law Judge.
" RICHARD GANTT, Law Judge.
" JOHN BELTON O'NEALL, Law Judge.
" JOSIAH J. EVANS, Law Judge.
" BAYLIS J. EARLE, Law Judge.
" ANDREW PICKENS BUTLER, Law Judge.

John A. Donald, Administrator de bonis non of Robert Gray *vs.* Charles Dendy.

1. Where a testator, in his last will, used the term, (in relation to a bequest of slaves,) "I will and bequeath Sarah, *and all her increase*"—the term, all her increase, was held to refer only to such children of the slave Sarah, as were born after the making of the will.
2. Parol evidence is only admissible to explain a latent ambiguity. If a testator devises his estate to a person, or class of persons, by name or description, and it should turn out that there is no person of the name, or that will answer the description, parol testimony may be introduced, to explain to whom the testator intended the bequest to be applied; for there is a latent ambiguity, which, if unexplained, would render the will inoperative. Whatever is necessary to explain the ambiguity of the legatee, is equally applicable to an ambiguity in the description of the legacy itself.

Tried at Abbeville, March, 1840, before Butler, J., whose report of the case is as follows:

Trover for negroes, Sarah Ann and her infant child.

These negroes were sold at sheriff's sale, under *fi. fa.* against West Donald, and bought by defendant. Sarah Ann is daughter of Annis, the

daughter of a negro woman by the name of Sary. The right to Sarah Ann depends on the right to Annis, and, as it is contended, the right to Annis depends on the history and title to Sary; so that it will be necessary to go far back to get at the history and true title to Sary.

*124] *Robert Gray, the alleged intestate, married *about* '96, or perhaps before, Nancy, the daughter of Alexander Donald. At the time of the marriage, Alexander Donald lived in Chester, and Robert Gray in Fairfield. After the marriage, Alexander Donald *sent Sary* to his daughter and son-in-law, who *shortly afterwards*, removed to Abbeville, bringing with them Sary. Not long after the removal, and perhaps in connexion with it, Alexander Donald moved to Abbeville, and lived there till his death, not far from Robert and Nancy Gray. Before A. Donald's death, which happened in 1803, Sarah had *a* child, called Annis. Whilst the parties lived in Fairfield, Sary had been *spoken of in the family*, as "entailed" property, and not subject to the debts of Robert Gray, and she was so spoken of in Abbeville, before and after Alexander Donald's death.

Alexander Donald left a will, by which he appointed John Donald, his son, and Andrew Gray, his son-in-law, his executors. Among other clauses in the will, is one to this purport—giving to his son-in-law and daughter, Robert Gray and Nancy, during their joint lives, and to the survivor of them, and at the death of the survivor, to the children of the marriage, three negroes, Peter, Little Frank, "SARY, AND ALL HER INCREASE." At the time *Sary and Annis, her child*, were in the possession of Robert and Nancy; Frank and Peter went into their possession under the will; Sary (not Annis) being mentioned in the same clause.

Robert Gray died in 1811, leaving a widow and three children, viz.: Mary Ann, who married West Donald, Elizabeth, who married James Donald, and a son, Robert Douglass Gray. His widow, Nancy, took out letters of administration, and had the personal estate appraised; two of the appraisers were John Donald and Andrew Gray. *Sary and Annis* were appraised, and returned in the inventory as the property of the intestate, but were never sold for distribution The widow held *them* till she intermarried with Charles Thompson, some time in 1812. After the marriage, she moved, with her husband to Newberry, taking with her the negroes, Frank, Peter, Sary *and Annis*. Her husband, Thompson, died in Newberry, and she returned to Abbeville, bringing back the *aforesaid*

*125] *negroes. While she was widow of Thompson, she sold Sary and *some* of her children, Edy, Stephen *and perhaps another*; she retained Annis till her death.

In 1823, Nancy married Andrew Paul, and had the negroes Annis and others; Paul died in January, 1825. After his death, by some arrangement with Hill, the executor of Paul, the negroes were delivered up to widow, as there was some legal question about their title; the widow also took *some* portion of Paul's estate, under the same arrrangement. Some time in the summer of the same year, Mrs Paul died intestate, leaving Elizabeth, who married James Donald, and Robert Douglass Gray, her children, surviving her. Mary Ann, who had married West Donald, died in 1820, leaving her husband and several children surviving her; *some* of the children are *yet* under age.

James Donald administered on the estate of Nancy Paul, and a division

of *her estate* was made among her children and their representatives, or supposed representatives. Sealy Walker was guardian of Robert Douglass Gray, then under age, and received the share assigned to him. James Donald received his wife's share; West Donald was present, and received a part, either for himself, or for his children. He received *Annis and Sarah Ann;* they were sold *afterwards* for his debts. He died in 1834, *and* one of his sons, John A. Donald, administered on the estate of Robert Gray, deceased, *and* asserted his right as *administrator de bonis non*, to the negroes in question, upon the ground that they had never been legally disposed of in a due and legal course of administration. He now contends, that they are to be regarded as a part of the estate of Robert Gray, which, as it appeared by the evidence, has no creditors.

The various grounds of objection to the recovery of plaintiff, were taken below, that are now taken in appeal.

The first question in point of order was, whether Annis and her child passed under the will of Alexander Donald; if so, the plaintiff had no interest. My own individual opinion was, that Annis had passed under the will under the terms of "Sarah and all her increase." The Court of Equity *had otherwise determined*, and I did not feel at liberty to question that decision

*The property was still in specie, and could be identified as *part of the estate of Robert Gray*, it never having been converted [*126 into any other form by Nancy, the administratrix; nor did I think the marriage of Nancy could operate as a legal gift and transfer to the husband. She took the property *to have it administered* and disposed of according to law, and not having done so, it was subject to administration by the administrator *de bonis non*. If her letters had been revoked during her life time, this would have been unquestionable.

I left it to the jury to determine whether Robert Gray took Annis, subject to the future control of Alexander Donald. If so, I thought the property ought to go as Robert acknowledged it should go. The evidence on this point was not satisfactory, and in candor, I think the case was decided according to my notions of the law; and if I was wrong in any point, I was also wrong in this, for I rather assumed that the property was part of the estate of Robert Gray, fairly subject to the claim of his administrator, and that he should recover the value of the negroes.

My judgment would modify somewhat the propositions made by defendant, but for safety to his rights, I admit that I overruled all his objections.

GROUNDS OF APPEAL.

The defendant appeals, and moves for a new trial, because of misdirection of the presiding Judge, in overruling the following points, which were made by the defendant on the trial below, and which will be again urged in the Court of Appeals, viz.:

1. That after collection of all the assets, and payment of all the debts of an intestate, the legal estate in the residue, in the hands of an administratrix, upon her death, goes to her representative, and not to an administrator *de bonis non* of the intestate; and the remedy to compel distribution and account is at equity, and at the instance of the distributees, and not at law, at the suit of an administrator *de bonis non*.

2. That the legal estate in the chattels of an intestate, reduced by the hus-

*127] band of an administratrix to his possession, *vests in such husband, and will not upon his death, survive to the wife, administratrix.

3. That Annis, mother of the slaves in question, is included in the disposition made by the will of Alexander Donald, of "Sarah and all her increase."

4. That it was a question for the jury upon the evidence offered, whether the terms of said will did not include Annis.

5. That independent of the will aforesaid, the acknowledgments of Robert Gray, that Sarah was "entailed," his long continued possession, in conformity with such acknowledgments, and the possession of his widow, with assertions of right on her part, and acquiescence on the part of the distributees of Robert Gray, all concurring in the same view of limited rights in Robert Gray, afforded presumptions sufficient to countervail the presumption of absolute title in Robert Gray, arising from his possession only.

6. That there is no distinction between Sarah and her children, all of whom were born after she went into the possession of Robert Gray; and there was error in directing the attention of the jury to such a distinction.

7. That the acquiescence of West Donald and his wife, and of James Donald and his wife, in the exclusive enjoyment by the widow of Robert Gray, of all the slaves which Robert Gray had in his possession at his death, (if it does not incontestably establish a right opposed to the title of Robert Gray,) raises presumptions of assignments and arrangements by each of the said husbands, in the lifetime of his wife; and the subsequent fair distribution into three parts, may be well considered as conformable to these assignments and arrangements, so as to bar even all equity in the children of West Donald.

8. That the right of West Donald, being vested in the defendant by purchase, and the rights of James Donald and Douglass Gray, being vested in him by Statute of Limitations, the plaintiff, at most, could recover only two-ninths of the value of the slaves.

A SUPPLEMENTAL STATEMENT, which varies those statements of the report that are *italicized*, and adds to the report.

*128] *Robert Gray and Nancy were married before the period to which the memory of any witness extended; supposed soon after the revolutionary war; one of the witnesses remembered Sarah as far back as '96; she was then a young woman, without a child, in possession of Robert Gray, in Fairfield, said to have come from Alexander Donald, but how, or when, unknown to the witness. She had one child, Annis, in Fairfield, prior to the removal in '98; three other children, Essex, Edy, and Stephen, were born in Abbeville, before the date of Alexander Donald's will, in 1803, and one child, Nancy, afterwards. All of these children continually remained with Robert Gray until his death, except Edy, whom he sent to his son-in-law, West Donald, soon after West's marriage, which took place the year after Alexander Donald died.

Robert Gray said, and Nancy Gray said, and it was talked of in the family, both in Fairfield and in Abbeville, before and after Sarah had children, that Sarah was "entailed;" and after the death of Robert Gray, Nancy always claimed the negroes in her possession, as hers for her life, independent of all right in R. Gray's estate. In speaking of Sarah being "entailed," one witness supposed that reference was had to a former will of Alexander Donald's; and another witness either supposed the same, or did not understand by what instrument she was "entailed."

Administration of the estate of Robert Gray was granted to Nancy, 1st April, 1811, and *de bonis non* to the plaintiff, in July, 1839. Administration of the estate of Nancy was granted in 1825, and the division took place the same year; but whether it was of her estate, or under the will, or some agreement, did not appear. In the inventory of her estate, the negroes are not included.

Little Frank, Peter, Edy, Essex, Stephen, and Nancy, are included in the inventory of R. Gray's estate, as well as Sarah and Annis; the inventory signed by the appraisers, and not by the administratrix. And (except Edy, claimed by West Donald, and Sarah and Stephen, sold by Mrs. Thomson,) all of these negroes,

with the issue of the females, attending Nancy in all her various changes, and were divided after her death.

*Nancy took no part of Paul's estate, except the negroes she brought with her. [*129

The youngest child of Mary Ann Donald is now about 21 years of age.

The sale to defendant, was in February, 1829.

The Judge held, that the doctrine of election, which the defendant's counsel endeavored to apply to the case, was unnecessary to be considered, as R. Gray, by his acknowledgments, showed that the title of Sarah was not vested in him, so as to be exempt from the distribution made by Alexander Donald's will; and then adverting to Annis, he left it as a question for the jury, whether R. Gray took Annis, subject to the future control of Alexander Donald.

James Donald and Robert Douglass Gray, have both left the State, with the negroes assigned to them in the division. The latter went in February last, and before he went, gave a bond, without security, binding himself to bring back the negroes, if plaintiff should recover.

The equity proceedings in the case of John A. Donald, administrator of Mary Ann Donald, and others, against Charles Dendy and others, were not in evidence, although the reported decree in that case was referred to as authority.

Evidence offered to aid in the construction of the terms "all her increase," in Alexander Donald's will.

In the 2d disposing clause: Jenny had no children in 1803.

In the 3d disposing clause: Anniky had children, not bequeathed, except as "increase," which have gone with her.

In the 3d disposing clause: Linda had no children then born.

In the 4th disposing clause: No child of Sarah bequeathed, except as "increase:" she had four then.

In the 5th disposing clause: Lusa had children not bequeathed, except as children.

In the 7th disposing clause: Chloe had these children, Henry, Isaac, Linda, Little Frank, and Little Ann, all bequeathed in various parts of the will.

In the 8th disposing clause: Little Ann had then no children.

The term "increase," nowhere added to any female when it could embrace only future increase.

No proof of any slave of testator not bequeathed specially in the will, besides those which it is contended were included under the terms "all her increase," or her "children." Specific bequests made of tools, and beds, a mare, a still, and part of a cotton gin.

**Curia, per* DUNKIN, C. In *Seibles* vs. *Whatley*, 2 Hill C. R. 607, the bequest was of "Nance and her increase." The Chancellor who heard the cause on the circuit says, "the words used do not limit the increase given with Nance to future increase. Increase, as a general term, will, I suppose, include past increase as well as future, and extend to all the children of the slave." But in revising this opinion, the Court of Appeals differed with the Chancellor, and say that "when the term 'increase of slaves' is used, it is the common understanding of men, that it refers to increase thereafter to be produced, and that they could not in any way construe them to relate to children born before the making of the will." It is not, perhaps, so important what the rule is, as that it should be fixed. Since the case of *Seibles* vs. *Whatley*, the term "increase," when used in a will in reference to slaves, must, as a general rule, be construed to include after-born children only. It is supposed that the term "*all* her increase," may make a difference. But supposing increase to have the established meaning of after-born children, all, is merely an expletive, and includes *all* her after-born [*130

children. Alexander Donald, the testator, died about 1803, and Robert Gray, the plaintiff's intestate, in 1811. Much evidence was given as to Gray's declarations, the condition of the parties, &c.(*a*) But it is very questionable, whether such testimony is admissible under the circumstances of this case. In *Wish* vs. *Kershaw*, reported in a note to *Shearman* vs. *Angel*, 1 Bail. Eq. R. 352, a question arose as to the admissibility of parol evidence, to explain the meaning of the term grand-children. "There may be a difference of opinion," says the Court, "as to the application of the rule on this subject; but there can be only one opinion as to the rule itself. It is very certain, that parol evidence is only admissible in such cases, to explain a latent ambiguity. If a testator devises his estate to a person or class of persons, by name or description, and it turns out that there is no one to whom the description properly applies, parol evidence may be admissible to show to whom the testator intended it to be applied; for there is a latent ambiguity, that is, an ambiguity ascertained by extrinsic proof, and which may
*131] *therefore be explained by proof of the same sort; and which, if not explained, would render the will inoperative. But if there are persons answering the description, and evidence is offered to show that the testator intended to include other persons, not coming within the description contained in the will, such evidence cannot be received, for there is no ambiguity to be explained, and the evidence is, in fact, offered for the purpose of altering the terms of the will, although there is nothing doubtful, either as to its construction or application." What is here said of an ambiguity as to the legatee, is equally applicable to an ambiguity in the description of the legacy itself. The testator bequeaths "Sary and all her increase." By the rule of *Seibles* vs. *Whatley* "increase" means after-born children. It is necessary always to resort to parol evidence, in order to ascertain to whom, or to what the description applies. It is not shown or suggested that Sary, from her age or from any other cause, might not have had after-born children. On the contrary, it is in proof that she had issue, born after the date of the will, and after the death of the testator. There is then, no such latent ambiguity as would warrant the admission of parol testimony, in order to give a different meaning to the terms, from that which the Court has heretofore given. If the intention of the testator was different, such intention must appear by necessary implication, on the will itself. In *Shearman* vs. *Angel*, already cited, it is said to be the rule, that if there be a devise "to children," this imports legitimate children; and that "if the words are to be explained or enlarged, so as to include the illegitimate, it must be done by clear expression, or necessary implication, on the face of the will itself." Giving to the defendant the full benefit of this principle, the Court have examined the several clauses of the testator's will. Nothing more is said in relation to this particular bequest; and although plausible arguments were certainly adduced, from the language of other bequests, as compared with the situation of the property, it seems quite too strong an inference to say, that the intention of the testator to include Annis in the bequest of Sary and all her increase, appears "by clear expression,

(*a*) See *Roxborough* vs. *Hemphill*, 5 Rich. Eq. 105; 4 Strob. L. 212; *Semb. Cont.* McMul. Eq. 451; 1 Rich. Eq. 396. *Am.*

or necessary implication, on the *face of the will itself." But in the case of *Donald* vs. *M'Cord & Dendy*, Rice's Eq. R. 330, the [*132 Court of Appeals in Equity, giving construction to the same clause of this will, held, that the terms "all her increase," passed only the after-born children, and that it was not distinguishable in principle, from *Seibles* vs. *Whatley*. That decision is not conclusive on these parties, nor in this Court. But if the correctness of that judgment were more doubtful, the Court would regard it as due to the satisfactory administration of justice, that the determination should not be disturbed. The motion is dismissed.

JOHNSON, C., and RICHARDSON, O'NEALL, EVANS, and GANTT, JJ., concurred.

Wardlaw and *Perrin*, for the motion. *Burt*, contra.

As to *issue*, see *Tidynan* vs. *Rose*, Rich. Eq. Cases, 299.

CASES AT LAW

ARGUED AND DETERMINED IN THE

LAW COURT OF APPEALS OF SOUTH CAROLINA.

Charleston, February, 1842.

JUSTICES PRESENT.

HON. JOHN S. RICHARDSON,
" JOHN BOLTON O'NEALL,
" JOSIAH J. EVANS,
HON. ANDREW PICKENS BUTLER.
" DAVID LEWIS WARDLAW.

Hon. BAYLIS J. EARLE was absent during this term, from indisposition.

ISAAC HARRIS *vs.* R. & J. CALDWELL.

Where a shop-keeper, himself, sold and delivered goods to a party, and during the same day, the entries were made by another person, who occasionally acted as clerk for him, it was held, that the book was no evidence of the debt, and that the evidence was inadmissible. *Vide Hurts* vs. *Neufville, in a note.* *S. P.*

Before EARLE, J., at Charleston, May Term, 1841.

Assumpsit on an open account for goods sold and delivered. The plaintiff, a shop-keeper, produced his book, and proved that the goods *134] were sold and delivered by him, *but that the entries were made, under his direction, on the same day, by another person, whom he occasionally employed for that purpose, but who was not present when the goods were sold and delivered.

The person who made the entries was also sworn, and proved that they were made by him, under the direction of the plaintiff. His Honor ruled that the book was no evidence of the debt, and the plaintiff was nonsuited.

He now gives notice that he will appeal, and move to set aside the nonsuit on the ground, that the book was as good evidence as if the plaintiff had made the entries with his own hands.

Mazyck, for the motion—cited 1 Brev. Dig. Act 1721, p. 315, (*a*) and said: is it essential that a shop-keeper should make the entries with his own hand? 1 Rice's Dig. 264. The wife sold; entries were made by her husband. The wife ought to have been examined.

(*a*) 7 Stat. 168, § 10. See 1 Bay, 41. P. L. 116. 3 Stat. 799. Index Books.

Richardson, contra—contended that all the testimony received was illegal. He is only allowed to prove his entries. The entry is the only evidence of a sale and delivery.

Curia, per O'NEALL, J. In this case, I understand from the Circuit Judge, that the entries were not made at the time when the goods were delivered, but in the evening of the same day; and that they were not made by a clerk, but by a friend, who performed such services occasionally for the plaintiff. These facts remove all difficulty as to the inadmissibility of the testimony, and reconcile the whole Court to the decision below. But a majority of the Court, however, taking the case made in the report merely, are satisfied to affirm the decision. The case, as made by the report, is, that the plaintiff's book was produced, in which was an entry in the handwriting of one not present at the delivery of the goods, and the plaintiff would have proved that he sold and delivered the goods, and that the entry was afterwards made by his direction, and in his presence. The question is, was such evidence admissible?

At common law, originally in this country, as well as in England, no one would have contended that it was. The decisions under 7 Jac. 1, c. 12, which enacts that the shop *book of a tradesman shall not be [*135 evidence after a year, will approach nearer to the question now before us, than any to which we can refer in the English books. In construing that statute, it would seem, by implication, that within the year, the book would be *in itself* evidence. Yet the Judges of England, in a variety of cases, held that it was not *so without some circumstance to make it so.* In Buller's N. P. 282, 283, a very good summary of the cases will be found, from which it will be seen, that in no instance was the plaintiff's oath resorted to, as in aid of the entry. Proof of the entry by the clerk making it, *as an evidence of his own transactions*, or, in the event of his death, the next best evidence, proof of his handwriting, was always necessary. When the person delivering the goods did not make the entry, but the proof was that it was the usual course of business, that the drayman came every night to the clerk of the brew-house, and, gave him an account of the beer delivered out, which he set down in a book, to which the drayman set his hand, and that the drayman was dead, and that the signature was his, it was held that the evidence was admissible.(*a*)

In a subsequent case, when an entry was offered to prove a delivery, a book was produced, belonging to the plaintiff's cooper, who was dead, but his name was subscribed to the entry of several articles delivered to the defendant, such as wine; and it was proposed to prove his handwriting. Lord C. J. Raymond excluded the testimony, saying it differed from Lord Torrington's case, because there the witness saw the drayman sign the book every night. These cases abundantly show, that the fact of an entry made by one not delivering the goods, never was evidence, unless it could be sustained by some other competent common law evidence to raise the belief of delivery, such as the proof that the drayman every night signed the entries made on his report; that he was dead; and that the signature to the entry was his. Salk. 285, Lord Torrington's case.

(*a*) *Vide* 2 Sp. 505; 4 Strob. 393, 400; 6 Rich. 448; 1 Sp. 287. *An.*

What difference has been made by the adjudications in this State? In 1786, it was said by Bay, (afterwards, and for nearly half a century,
*136] Judge of this Court,) in arguing *_Foster_ vs. _Sinkler_, 1 Bay 40, that it was very doubtful whether the statute of 7 Jac. 1, chap. 12, ever went into operation in this State. If it ever did, it must soon have fallen into disuse, or have become obsolete. For the county and precinct Court Act, passed nine years after this and other English statutes were made of force in this State, in its tenth clause, recites the law as understood and practiced in this State, to be, "that it had been before allowed for law in the then Province, *that books of account shall be allowed for evidence, the plaintiff swearing to the same.*" The Court, in their decision, 1 Bay, 45, affirmed this view, that the "original book of a merchant or shop-keeper, is good evidence to go to the jury on the plaintiff swearing to the same." In the same case, Pendleton, J., said that "these entries were, in this country, *prima facie* evidence of a delivery." If that case stood alone, it might be difficult to avoid the conclusion, that upon the plaintiff swearing that the book offered was his original book of entries, it would be evidence to go to the jury as *prima facie* evidence of delivery. But the Court, in a previous case, that of *Lynch* vs. *McHugo*, 1 Bay, 33, declared that the rule by which such evidence was received, was in derogation of the common law, and ought to be strictly guarded. In that case, a "post entry" was held to be inadmissible, and *that*, in itself, was, perhaps, enough to confine the proof to every entry, and to make it necessary that each should be proved by the person making it, and that it should be made when the delivery was made. In a subsequent case *Turner* vs. *Rogers & McBride*, 1 Bay, 480, it was ruled, that an entry made by a clerk, must be proved by him, if he be alive and within the State. In *Lamb* vs. *Hart's Administrator*, 1 Brev. Rep. 105, the third resolution of the Court was, that "the plaintiff *himself* shall be allowed to prove *the entries* made in his own books of account, when such evidence is the best that the nature of the case admits of, *as when the entries are in his own handwriting.*" Putting those cases together, they very plainly establish the rule to be, that *when the plaintiff, a shop-keeper, sells goods, and at the time of delivery, entered the goods so sold in his book, that he may be permitted, under the usage and practice in this State to prove such entry.*
*137] *It will be observed, on analyzing this rule, and testing it by the decided cases, that *the entry* is evidence of delivery, and not *the oath* of the shopkeeper, *that he did deliver*. In *Deas* vs. *Darby*, 1 N. & McC. 436, Mr. Justice Johnson stated the rule to be, that book entries prove no more than the delivery of the articles charged. The facts that he did deliver, and that the entry was made by himself at the time of delivery, may be inquired into by the defendant, if he chooses to test the propriety of admitting the entry. And if either of them be wanting, the entry cannot be read. It may be, that some hardship may result, in the application of this rule to the business of life, but it must be remembered, that the rule, by which the plaintiff himself is allowed to prove his own entry, was engrafted by our ancestors on this branch of the English common law, on account of the difficulty, in the early settlement of this country, of procuring clerks to keep books. That difficulty has long

since been removed, and there is now, therefore, no reason to give *any, even the slightest extension*, to the principle settled in 1786. But I think some of the supposed hardships will not be found to exist. A sale by a merchant, and an entry by a clerk, or reversing it, a sale by a clerk, and an entry by the merchant, at the instant of delivery, will be always regarded as one transaction, and the proof of the entry by the clerk or merchant, under such circumstances, will be all that will ever be required.

I have looked into the case of *Hurtz* vs. *The Executors of Neufville :* the point really decided *there, was that the plaintiff*, who made an entry of goods delivered by his wife, in his absence, was incompetent to prove it. This is in support of the view which we take of the case before us.

It is true, the Judge, in delivering the opinion, does intimate that the wife might have been called in aid of the husband's proof. But from the manner in which he expresses himself, it is plain, that he supposed she could prove the entry made by her husband, in the same manner as if she had made it herself. It is, however, clear, that in this he was mistaken; and this error of expression, proceeding from one of so much *wisdom discretion and experience*, is to be ascribed to the fact, that his *mind was not turned to the distinction now made. The motion is dismissed. [*138

Richardson, Evans, Butler and Wardlaw, JJ., concurred.

Jacob Hurtz *vs.* Executors of Neufville.

Before Huger, J., at Beaufort, Fall Term, 1827.

This action was brought on an open account. The plaintiff was sworn, and produced his book of original entries. This book was objected to. It was not very regularly kept, but was admitted. The articles were charged by the plaintiff, to the defendant's testator. The witness was asked if they were delivered to the testator; he said no, but to Kitty Roulain, by his order; he had no written order, and his evidence was regarded as incompetent to prove the delivery. To supply this deficiency, the plaintiff produced a promissory note, drawn by the testator, and made payable to the plaintiff, for $200, which had been credited in the book, and afterwards paid by the agent of testator. The witness was asked if he had, himself, delivered all the articles to Kitty Roulain; he replied that the greater part had been, and the rest were delivered by his wife, in his absence, and on his return home had been charged by him. He could not designate the articles delivered by himself.

A verdict was rendered for the plaintiff. The defendant appeals, on the enclosed grounds.

Additional Report of his Honor.

Coosawhatchie, Nov. 1827.

Tried before his Honor, Judge Huger.

Assumpsit on a Merchant's Account *vs.* the defendant, as Executrix of Edward Neufville.

At the trial, the plaintiff produced his book, which was objected to, as being on the face of it, not a regular tradesman's book, in which entries are made, in a certain order, but consisting of loose memorandums, relating to business. His Honor admitted the objections were strong to the book, but received it in evidence.

The plaintiff then swore to the entries. The defendant asked if the goods were delivered to the testator, and the plaintiff answered no, but added that he delivered them to Kitty Roulain, by his order. To the latter part of this answer, the defendant objected, on the ground, that the authority to deliver

the goods to another person, could not be proved by the plaintiff's oath. He was then questioned, whether he had delivered all the goods, and admitted that he had not, but that some were delivered in his absence, by his wife, and that he afterwards made the entries as she directed, and he could not designate the things which he had delivered himself. To prove an authority to deliver the goods to Roulain, a note of the testator to the plaintiff, for $200, was produced. The note appeared to have been paid by Thomas Cochran, and is in his possession.

The defendant moved for a *nonsuit*, which was denied, and the jury found a verdict for the amount of the plaintiff's demand.

The defendant appeals from the decision of his Honor, refusing a *nonsuit*, and hopes his Honor's decision will be reversed, and a *nonsuit* granted, because the plaintiff's evidence was insufficient to sustain the action.

*139] *In case this motion should not be granted, she moves for a new trial.

1. Because the plaintiff's book ought not to have been allowed to go to the jury.
2. Because the evidence was insufficient to prove a delivery to a *third* person, and that person should have been produced.
3. Because there was no evidence to prove an order of the testator to deliver the goods to Roulain.
4. Because the entries were made, as plaintiff admitted, partly on the recollection of his wife, and his oath, therefore, could not supply any proof as to them.

Curia, per JOHNSON, J. The objection to the admissibility of the plaintiff's book of account as evidence, is founded on the informal and irregular manner in which it has been kept, and from the specimen exhibited on the argument of this case, it is true that the manner is very unmercantile, and would, perhaps, shock a regular clerk, but the Court do not feel themselves at liberty to prescribe the mode in which merchants and shop-keepers shall keep their books. The best informed amongst them would perhaps differ about this matter, and if they are so kept as to be intelligible, I see no reason why they should not be equally admissible, whether they are kept by double or single entries, or as in this case, by setting apart a page, or part of a page, for each customer, and exhibiting at one view the whole account, or whether the credits and payments are expressed by a formal entry of the amount, with the day and date, or by crossing the account, or writing on it in a strong hand, the word "paid." The books of such persons are allowed for evidence, and cannot, therefore, be excluded, but it does not follow that they may not, upon the face, exhibit such evidence of fraud as would justify a jury in discrediting them; and instances of that sort have occurred within my own observation; but that is a matter for the consideration of the jury, and not for the Court, and a sufficient motive might, it is thought, be found to induce more attention to keeping books, in the circumstance, that those in the most approved form would most likely obtain the most implicit credit. The defendant's motion cannot, therefore, prevail on the first ground.

I was under the impression while the 2d and 3d grounds were under discussion, that the plaintiff had been permitted, himself, to testify that most of the goods were delivered to Kitty Roulain, by the order of the defendant's testator; and I was prepared, on the authority of the case of *Deas & Darby*, (1 Nott & McCord, 436,) to say that such evidence was inadmissible; but I find, on the examination of the Judge's report, that it was rejected, and those grounds rest on the circumstance that the jury were permitted to draw the conclusion, that the whole account was just, from

the fact that the defendant's testator had given a note of $200 to plaintiff, which had been credited in part of the account

The power of a jury, in this respect, is very latitudinary, but in general, where the law itself establishes a conclusion from a given state of facts, they cannot gainsay it—for the same reason that a receipt is *prima facie* evidence of a payment, a note given by a debtor to his book creditor, is a presumption of a settlement, and although neither is conclusive, the *onus* is thrown on the party denying it, to show that the receipt was given by mistake, or that the note was given for another consideration than the account claimed.

A stronger illustration of the correctness of this rule, than the present case, is not perhaps furnished in the whole history of judicial proceedings.

The plaintiff exhibits here an account against the defendant's testator, for more than $400, for goods, the most of which were delivered to a third person, and he shows, that after they were so delivered, the plaintiff gave him a note in payment, for less than one-half* of the amount. [*140 Now, every man of business knows, that the sole object of substituting a note for an account, is to shut the door upon future investigations, as to the account; and this is a rare instance, if such is the fact, in which a note has been given for a part of the amount only, when the whole was owing; and if I were at liberty to draw a conclusion from these facts, it would be, that the defendant's testator rejected the account which now comes before us in so questionable a shape, and consented to pay only so much as he was bound for, which the plaintiff accepted. But this conclusion might do the plaintiff injustice, and I will turn it over to the proper forum, (the jury,) who will doubtless put it right.

The 4th and last ground is, I think, fully sustained. The entries made by the husband, the plaintiff, of goods delivered by his wife, in his absence, cannot be proved by the plaintiff; the wife is equally competent, and is higher evidence. The answer that the amount thus charged is inconsiderable, cannot avail—he could not distinguish the items, and how, therefore, can he undertake to speak of the amount? But it is enough that the jury have found the whole amount on evidence incompetent, at least in part. New trial granted.

NOTT and COLCOCK, JJ., concurred.

See *St. Philips Ch. ads. White.* Infra, 306. *An.*

CHARLES M. CREIGER, ET UX., *vs.* B. J. SMITH.

Where an action of assumpsit is brought, in the name of husband and wife, jointly, and the declaration alleges the promise to have been made jointly, without stating what interest the wife had, or any reason is shown why she should have been joined, it is such a defect as cannot be cured by the verdict, and which is fatal upon a motion in arrest of judgment. 1 Chitty. Pl. 20; 2 Wm. Bl. 1236; 2 Caines' Rep. 221; 2 Bur. 170.

NOTE.—This case was tried before his Honor, Judge WARDLAW, at Gillisonville, January, 1842. The above is the principle decided in the case, and the Reporter viewed this as all that was necessary—the only question arising out of a defect in the declaration.

(*a*) S. C. more fully reported Infra, 279. *An.*

*141] *D. & J. EWART *vs.* T. J. KERR.(*a*)

Plaintiffs brought an action of trover against defendant, for seven bales of cotton, part of a cargo shipped by them to their factors in Charleston, on board Michael Harkins' *Bay Boat, the Belle.* During the voyage the cotton thus shipped was damaged to the amount of $358,61; defendant detained the seven bales of cotton, under his lien as a carrier for freight. The damage done to the cotton, exceeded the claim of freight. *Held*, among other things, first. That the factors, the consignees of the cotton, had no such interest as divested the plaintiffs of their right of action.

2. That where the injury, done by the carrier to the cargo, exceeded the freight, to that extent the carrier's right to freight, would be defeated.

3. That where the thing converted, is reduced to money, in the hands of the defendant, the smallest measure of damages in trover, is always the amount received from the conversion, with interest from the time of conversion.

Before O'NEALL, J., at Charleston, May Term, 1840.

This was an action of trover for the recovery of the value of seven bales of cotton, part of a cargo of two hundred and fifty bales, shipped from Columbia by the plaintiffs, to their agents, Boyce, Henry & Walter, Charleston, at the freight of $1 per bale, on a bay boat, called the Belle, and owned by one Michael Harkins. The boat was near five weeks in accomplishing her trip; on her arrival, it was found the cotton was damaged by exposure to the weather, during the wet and warm weather of July and August, in which she made her trip. The defendant was the agent of Harkins; he and Boyce, Henry and Walter, as the agents of the plaintiffs, agreed upon a survey, and the surveyors found that the cotton was damaged in the manner already stated. The plaintiffs proved the actual damage sustained to the amount of $358.61. From this amount of damages, the agents of the plaintiffs insisted the freight should be deducted. The defendant contended that the freight should be paid, and his demand not being complied with, he delivered two hundred and forty-three bales of the cotton, and retained seven bales for the freight. The plaintiffs, by their agents, demanded the cotton, which he refused to give up, and thereupon this action was brought. Subsequently, by an agreement between the plaintiffs and the defendant, the seven bales of cotton were sold, and so much of the proceeds as exceeded the freight, was paid to the plaintiffs; the amount covering the freight was to be *142] recovered or retained, according to the *rights of the parties, as they might be adjudged in this case. Pending this suit, Harkins died. The plaintiffs sued his administrator for the damage done to the cotton, and recovered $358.61, for which sum, on the 30th of July, 1839, they entered up judgment. On this judgment which had been recovered, subject to the plea of *plene administravit praeter*, the plaintiffs received their dividend of the effects of Harkins, amounting to $215.16, leaving a balance of their damages, $143.45, still unpaid. At the close of the plaintiffs' case, the defendant moved for a nonsuit on the grounds,

1st. That the action ought to have been in the name of the consignees.

2d. That there was still a balance of freight due to the carrier, after allowing the plaintiffs to discount their remaining damages against it. The freight being $250, the balance of damages unpaid $143.45, there

(*a*) S. C. before, Rice L. 203. *An.*

remained $106.55 of freight still due, for which the carrier and the defendant, his agent, had a lien upon the seven bales of cotton, no tender of this balance of freight having been proved.

On the first ground it was ruled by the Court, that the proof was clear that Boyce, Henry & Walter were merely the agents of the plaintiffs, to sell the cotton; and that they had, therefore, no such interest under the consignment, as divested the plaintiffs of their right of property.

On the second ground, it was held, that at the bringing of this suit, the damage done to the plaintiffs' cotton exceeded the freight. That they subsequently recovered a part of it, was in aid of the defendant, by relieving him from a portion of the sum in his hands, to which the plaintiffs were entitled. It could not affect their legal rights, to recover against the defendant when their action was brought.

The motion for nonsuit was overruled.

The case went to the jury, who were instructed, if the cotton was injured in the possession of the carrier, by any thing else than such as arose from the act of God, or the enemies of the country, that then the carrier would be liable for such injury, and that it would, to its extent, defeat his right to freight. They were told that in the action *of [*143 trover, the plaintiffs were entitled to interest on the value of the thing converted from the time of conversion, and that here, after they had allowed the deduction of the sum paid by Harkins' estate, they would be entitled to interest on the balance of their damages in the hands of the defendant from the conversion.

The jury found accordingly; the defendant renews, in the Court of Appeals, his motion for *nonsuit*, on the grounds taken on the Circuit, and failing in that motion, he moves for a *new trial*, on the grounds:

1st. That no interest should have been allowed on the balance of damages, $143.45, prior to the judgment against the administrator, 30th July, 1839, as until then they were unliquidated.

2d. The plaintiffs had demanded interest on their damages in their action against the administrator of Harkins, and the jury had refused to allow it.

3d. That if the plaintiffs were entitled to a verdict, under the circumstances, the damages should have been only nominal.

Curia, per O'NEALL, J. This case indirectly makes the same question which was formerly decided,(*a*) and with which we remain satisfied notwithstanding the frequent direct and indirect reviews to which it has been subjected. No one ever doubted that a carrier's lien consists in a right to retain his cargo until paid his lien. But when he retains only a part and not the whole, I think he may be fairly required to measure the part retained by the amount due, if, in point of fact, he had no lien on account of damages sustained by the plaintiff in the transportation of the goods, then the allowance of the balance of freight due to him is a new matter in mitigation of damages.

The true view of the case is to consider it as standing upon the proof, that the plaintiffs' cotton was damaged to the amount of three hundred and fifty-eight dollars and sixty-one cents, which is a greater sum than the freight due, and when this was shown the defendant's right to retain for freight was also gone. For it all properly ought to be absorbed in

(*a*) Rice, 203. *An.*

damages; and if in the action brought by *Ewart* vs. *Harkins's adminis-*144] *trator*, the *defendant had set off the freight, the whole matter would have been free from difficulty. If he did not choose so to do, the plaintiffs' right cannot be thereby affected. The utmost which Harkins, in whose place the defendant is, could now ask in the case against him, would be to diminish the damages in trover by deducting from the amount for which the cotton sold, as much as might remain of the freight, after deducting the uncollected balance of the damages found for the injury done to the cotton. This was done in this case, but it is said the defendant is injured by this course. How? He has two hundred and fifty dollars of the plaintiffs' cotton in his hands. If Harkins had set off the freight in the action against him, the defendant must have paid this whole sum, with interest and costs; as it is, he has one hundred and five dollars and fifty-five cents left in his hands to be accounted for to Harkins, out of which he may retain his costs. In this way it seems to me he is benefitted. But it is agreed the plaintiffs get more in the way in which they proceeded than they would if the freight had been deducted at law. If that had been done, they would have recovered the whole sum retained by Kerr for freight, two hundred and fifty dollars, and their dividend on one hundred and forty-eight dollars and sixty-five cents, the balance of their damages, say eighty-six dollars and seven cents, making an aggregate of three hundred and fifty-eight dollars and sixty-one cents. Now they receive their dividend on three hundred and fifty-eight dollars and sixty-one cents, the damages found two hundred and fifteen dollars and sixteen cents, and one hundred and forty-three dollars and forty-five cents, the verdict in this case, making an aggregate of three hundred and fifty-eight dollars and sixty-one cents. But they pay on account of the freight, the balance left in Kerr's hands one hundred and six dollars and sixty-five cents, which must be deducted from the last aggregate, which leaves the amount really obtained by them by the course of actions to which they have been driven two hundred and fifty-one dollars and ninety-six cents, less by eighty-four dollars and eleven cents than the sum to which they would have been otherwise entitled.

But these considerations really have nothing to do with this case; the recovery of damages against Harkins' administrator could not restore the defendant's lien. It was ended from the fact of injury done to the plaintiffs' cotton to a greater amount. After the recovery, Harkins' administrator might have brought a cross action for his freight, against which any balance due in the former recovery would be set off. Without all this circuity this has been done in effect by the verdict here. The other grounds relating to interest may be disposed of at once, by simply re-*145] *marking that where the thing converted, is reduced to money, in the hands of the defendant, the smallest measure of damages in trover, is always the amount received from the conversion, with interest from the time of conversion. The motion is dismissed.

EVANS, BUTLER, and WARDLAW, JJ., concurred.

McCready and *Caldwell*, for the motion.

Petrigru and *Lesesne*, contra.

THE TREASURERS *vs.* JOHN OSWALD, ET AL.

Where a sheriff has been sued on his official bond, and to the plea of performance, there is a replication, by plaintiff's assigning as a breach, "that the sheriff, during his term of office, to wit, on the 1st January, 1821, and on divers days between that day and the 25th January, 1817, had and received, for and on account of the plaintiff, &c., a large sum of money, to wit, the sum of $2,396 92, and that the same was not paid over." To this replication, there were special demurrers. In the Appeal Court, the demurrers were overruled, and the replication was sustained.

Before O'NEALL, J., Colleton District, Spring Term, 1841.

These were actions of debt, on the official bond of Wm. Oswald, late sheriff of Colleton, during his term of office, from February, 1817, to February, 1821. To the pleas of performance, the plaintiffs replied, and assigned for breach, that the said sheriff, during his term of office, to wit, "on the first day of January, 1821, and on divers days between that day and the 25th of January, 1817, had and received, for and on account of the said Treasurers, and their successors in office, a large sum of money, *to wit, the sum of $2,396.92" and that he did not pay the same over. To which, there were special demurrers, for the causes. [*146 1st. That the plaintiffs did not set forth at what specific times, and in what several sums, the said sheriff received the said sum of $2,396.92. 2nd. That the said replication assigned several and independent breaches.

The Court thought the replication was too general, and sustained the demurrer.

The plaintiffs appeal, and contend that the decision should have been otherwise.

Mr. Edwards, for the motion, submitted the case without argument.

Mr. Rhett, contra, argued the case, and cited in support of his view, 2 Saund. 411, note 4; 1 Chit. 461; *Gainsford* vs. *Griffith*, 1 Saund. 58; *Arlington* vs. *Merricke*, 2 Saund.

Curia, per O'NEALL, J. On the authority of the rule stated by Mr. Sergt. Williams in his note 4, to *Arlington* vs. *Merricke*, 2 Saund., 411, that "when a subject comprehends multiplicity of matter, then, in order to avoid prolixity, the law allows of general pleading," we think the demurrer ought to have been overruled. For, although the replication is very general, and does not even state from what causes the money arose, which the replication alleges that the sheriff received for and on account of the Treasurers, yet the fact stated that it was money received for and on account of the plaintiffs, brings it within the cases referred to by Sergt. Williams, and therefore, we are disposed to sustain the replication.

The motion to reverse the decision below is granted, the defendants' demurrer is overruled, and they are ordered to rejoin.

RICHARDSON, EVANS, BUTLER and WARDLAW, JJ., concurred.

See *Treasurer* vs. *Rivers*, post. 209; *Treasurer* vs. *Bucknor*, post. 324. *An.*

*147] *ALLEN J. DEAN *vs.* SOLOMON HORTON.

1. In action for an assault and battery, the preceding words, or imputations of the same kind as those which immediately led to the assault, if previously communicated to the defendant, may be offered in evidence, by way of mitigation of damages.
2. The inducement to the transaction, and all such particulars, in the conduct of either party, leading to the final act, or forming part of it, as seemed to show in what degree blame attached to them severally; and such acts as would aid the jury in determining the just measure of damages, would be admissible evidence.

Tried before WARDLAW, J., at Gillisonville, January, 1842.

The defendant committed a grievous battery upon the plaintiff, at a shooting match.

At various periods, on the day of the injury, the parties were observed. They met and shook hands. Horton was afterwards seen to lay his hand in a rude manner on Dean's breast, and to use some provoking language, which Dean did not notice. They sat together some time in conversation. Horton passed when Dean was talking abusively of him, and said, "Mr. Dean, you have been talking enough of me—it is time to quit." Dean being somewhat intoxicated, was talking in an ordinary strong voice, (without regard to who should hear, and was overheard by several persons,) with a witness on horseback, to whom he said, that he and Horton had settled their difficulty; then he joked the witness about giving a frock to Mrs. Horton, and being checked said that Mrs. Horton was the damnedest liar in the world; abused her much; said of her every thing except that she was a virtuous woman; and mentioned certain words that he said she had spoken, which implied her indecent intimacy with his son. At this moment Horton rushed forward. Instantly, Dean struck. Horton drew a pistol, and shot Dean in the hand, and immediately drew a knife, with which he stabbed Dean in the hip. The wounds were severe, but not dangerous.

It was manifest that Horton came provided with deadly weapons; and by way of further mitigation and explanation of his conduct, he offered to show imputations upon his wife's chastity, made by Dean, at times preceding the day of their meeting. This was objected to, but the presiding *148] Judge held that preceding imputations of the same *kind as those which immediately led to the assault, if previously communicated to the defendant, might be offered in evidence. Under this permission, the defendant proved, that at various times, and to various persons, the plaintiff had talked of different men having given frock patterns to Mrs. Horton, with a meaning which all understood to be injurious to her; and that these conversations had been repeated to the defendant, who, on one occasion, to a witness, threatened to shoot Dean, if he did not quit talking about Mrs. Horton.

The Court brought to the consideration of the jury, the very blameable conduct of both parties, and told them that the damages should be estimated without regard to the fact that there was a conviction on an indictment for the same battery; the jury found a verdict of one dollar.

The plaintiff appeals, on the grounds annexed:

1. Because his Honor permitted testimony of provocation, on the part of

the plaintiff, accruing at various times before the day of the alleged assault, to go to the jury.

2. Because the verdict was, in other respects, contrary to law and *the evidence.*

Hutson, for the motion. If the Judge admits evidence which should be rejected, it is good ground for a new trial. *Kinloch* vs. *Palmer et al.*, 1 M'C. R. 216. The Court will not pretend to judge how far it did or did not influence the jury, but will grant a new trial. *Everingham* ads. *Langton*, 2 M'C. 157. And this, although there is no apparent error in the verdict itself. *Smyel* vs. *Niolon*, 2 Bail. 421.

The Judge did admit improper evidence—for no evidence of provocation occurring before the day of assault is admissible. *Avery* vs. *Ray*, 1 Mass. R. 12. And he admitted evidence of defendant's character, to which plaintiff objected. *Lloyd* vs. *Monpoy*, 2 N. & M'C. 446.

The Court will sometimes interfere, and order a new trial, from the smallness of the verdict.

Outrageous assault, $1 damages—new trial ordered. *Bacot* vs. *Keith*, 2 Bay. 466, which is a case all fours with ours. See also, *Wallace* vs. *Trapier*, 2 N. & M'C. 516; *Richardson* vs. *Dukes* 4 M'C. 156.

**Martin*, contra. Quoted and relied on *Rhodes* vs. *Burrell et al.*, 3 M'Cord, 66. Where facts and circumstances were permitted to be given in evidence, even when they involved character, and the case of an insult to a wife or daughter, was one of the illustrations used by Judge Nott. He farther contended, that it was a case of which the jury were the proper judges. [*149

Curia, per WARDLAW, J. This Court thinks that the testimony objected to was admissible.

It might be said that this case differed from the case of *Avery* vs. *Ray et al.*, 1 Mass. 12, which has been relied on for plaintiff, in this: that there, it appeared that no provocation at all was offered on the day of the injury, and it could have been only by presumption, that any previous provocation could have been assigned as the motive of the defendant; but the principles assumed, and the language employed by the Judges, who decided that case, are opposed to the admission of the testimony here. The case of *Rhodes* vs. *Burrell*, 3 McC. 66, decided by our own Court, is, however, in language equally strong, in favor of the admission, and it seems to be as well supported by reason.

The testimony was offered in mitigation; inquiry was to be made into the motive of the defendant. The inducement to the transaction, and all such particulars in the conduct of either party, leading to the final act, or forming part of it, as seemed to show in what degree blame attached to them severally, were calculated to aid the jury in determining the just measure of retribution and punishment. A provocation seeming light, may have exasperated patience, if it were a repetition of an offence, before often given and endured; and resentment, otherwise rash, or preparation, otherwise ferocious, may be explained by the previous relation of the parties in former occurrences between them.

In like manner, the testimony offered by the defendant, of his own peaceable character, objected to here in the argument, was calculated to throw light upon the nature of the provocation which could have suddenly roused him *to extreme revenge, and is wholly different from testimony of the plaintiff's character not put by himself in issue. The motion is dismissed. [*150

RICHARDSON, O'NEALL, EVANS, and BUTLER, JJ., concurred.

G. W. Cooper *vs.* W. R. Scott.

A sheriff is bound to take notice of the liens in his office, and to pay money collected by him under official authority, to the oldest execution. And when he pays money to a junior execution, he does so at his own risk, and he will be held liable for the consequences either by rule or action at law. *See Act* 1839, 21 *sec., p.* 30, *defining sheriff's duties.*(*a*)

2. When there is a contest for money, collected by a sheriff in his official capacity, he is a stakeholder and must hold his hand (but in good faith and without collusion with either party), until the adverse claims are subjected to adjudication.(*b*)

3. A rule will always go where the legal rights of the parties can be made to appear from a conceded statements of facts. But where the facts are disputed, and the law depends on their developement, the parties should be left to their action at law, or an issue will be directed at law to try them.(*c*)

Before Richardson, J., at King's Tree, Spring Term, 1841.

The defendant was indebted to the plaintiff, by judgment, to the amount of $800, for which a *fi. fa.* had been sued out, and lodged in the sheriff's office on the 19th November, 1839. The plaintiff had also recovered judgment for the same debt, against Dr. W. J. Buford, who was surety of the defendant, W. R. Scott, for the said debt. There were other executions in the sheriff's office against W. R. Scott, in favor of other creditors, to the amount of $550, of the same date with that of the plaintiff, G. W. Cooper; and there were junior executions against him, to a conside-
*151] rable amount, but no senior unsatisfied judgment *or execution. At this term, the plaintiff, G. W. Cooper, took out a rule against the sheriff, to show cause why he had not made the money under the said execution. The rule was taken out at the instance of Dr. Buford, whose counsel were present and joined in the conduct of the proceedings under the rule. These proceedings, and the questions made in them, will be fully understood from the report of his Honor, the presiding Judge, which is as follows:

This was a rule upon the sheriff of Williamsburg district, as follows: on motion of Harllee and Rich, plaintiff's attorneys, it is ordered, that the sheriff, Solomon Coward, do show cause, on to-morrow morning, at ten o'clock, why he has not made the money in the above stated case, and particularly why he has not applied the proceeds of the sales of the following property, sold as defendant's, under executions in his office, to the above case, to wit; Jacob, sold for $721, Milly, and Dolly, for $501, Beck, for $665, Lucy for $256, three hundred and seventy-five acres of land for $260, three horses for $98, and a riding chair, for $36, and some cattle: the said sales amounting, besides the cattle, to $2,537.

To this rule, the sheriff returned, that he had sold the property mentioned in the rule, under the execution above stated, and sundry other executions in his office against the same defendant, many of them of the same date with the execution of G. W. Cooper. But that there were mortgages of the said property, given by the defendant, of a prior date to the date of the lodgment of the executions against the defendant,

(*a*) 3 Rich., 1; 2 Bail., 412; 4 Rich., 130. *An.*
(*b*) 1 Hill, 147; 2 Rich., 528; 10 Rich., 121. *An.*
(*c*) 2 Bail., 619; 6 Rich., 322. *An.*

in his office. That at the time of the sale, the mortgagees were present with their mortgages; that they consented to the sale, with the understanding, as the sheriff supposed, with the plaintiffs in execution, and himself, that the proceeds of sale should be first applied to the mortgages. The plaintiff in execution, G. W. Cooper, was not present at the sale, but, after the application of the funds, informed the respondent, that he was satisfied. The respondent applied, and paid the whole of the funds, with the exception of about $300, to the payment of the mortgages, believing that he was doing what was equitable and right.

*To this return the plaintiff excepted, as insufficient, because [*152 the sheriff had not returned and accounted for the sale of Rose and her children, made 6th January, 1840, amounting to $1131.

Upon which the sheriff amended his return, as follows:

The sheriff further returns, and after hearing particularly what was further required by the plaintiff's counsel, that he levied on a negro woman Rose, and children, as property of the defendant. That he offered them for sale, and the sale was forbid by J. T. Scott, who claimed them, as trustee, under a deed of trust in favor of the wife of defendant. The sheriff stopped the sale, as the deed was older than the cause of action in said execution, and he immediately notified the plaintiff that he would not sell without indemnity; but the said plaintiff said he would not give a bond of indemnity, as he would not risk it. The negroes were afterwards put up by the sheriff on executions of Chandler and Graham, the causes of action being older than the deed, by consent of the trustee; and the proceeds of sale, by consent of the trustee, were paid to the said cases, leaving a balance in the hands of the sheriff of $371.73, which the trustee is demanding, and the execution creditors have forbidden him to pay to the trustee. He has the balance, ready to pay, when he can do so under protection. He has also in his hands sundry executions of same date as plaintiff's against defendant.

The sheriff submits that he is not in contempt. He has done every thing in his power to make the money of plaintiff out of defendant, and it has not been in any way his fault, that the property of defendant was incumbered, so as to be beyond the reach of plaintiff's execution. He respectfully submits, that it is a contest for the money between the creditors and the trustee, and that he is not in fault, or contempt. He refers to his whole course, as sheriff to testify that it has been his pride to perform his duty, so as never to be in contempt of the Court of which he is the executive officer.

The Court saw nothing in the proceedings to induce the supposition, that the sheriff had committed any contempt, and the Court would not impose any penalty or punishment upon its officer, where it appeared that there *was no contempt committed by the officer to the authority [*153 of, or in violation of the respect due to, the Court.

Upon this ground the rule was discharged. The plaintiff appeals upon the grounds annexed.

The plaintiff, G. W. Cooper, on behalf of Dr. W. J. Buford, appeals from the decision of his Honor dismissing the rule, and moves that the same may be reversed; and that the sheriff may be ordered to pay over so much of the moneys in his hands, arising from the sales of property mentioned in the said rule, and his returns thereto, as will be sufficient to

satisfy the amount due on the plaintiff's judgment at the time when the said rule was argued in the Circuit Court, with interest and costs. And in support of his said motion, he relies upon the following grounds:

1. That in making sale of the property alleged to have been mortgaged, the sheriff sold, and could sell, nothing but the equity of redemption, and the proceeds of the sale were, therefore, applicable to the plaintiff's execution; and that his payment to the supposed mortgagees could not exempt him from the performance of his official obligation to pay over the said proceeds to the satisfaction of the executions in his office, according to their legal priority.

2. That if a voluntary conveyance be fraudulent and void as to an existing creditor, it is void as to all creditors; and where a subsequent creditor has acquired a prior lien by judgment and execution against the donor, if the property which forms the subject of the gift, is sold under a junior execution of the existing creditor, the subsequent creditor is entitled to the proceeds, by virtue of the lien of his prior execution. And whether the gift be fraudulent and void, or not, if the property is sold as the property of the defendant, and under execution against him, the proceeds must be applied to the senior lien in the sheriff's office.

3. That the sheriff is bound to apply the proceeds of property sold by him to the oldest lien in his office, and he has no authority to look into the cause of action for the purpose of administering a fanciful equity. And to permit him, *154] in violation of the plain rules of law, to pay *a junior execution, and put an older execution creditor to his action, on the plea that he intends no disrespect to the Court, would be to place parties at the mercy of sheriffs, and render the law for the recovery of debts wholly nugatory.

4. That the right of the plaintiff in an execution to a rule, against the sheriff, for the payment of money in his hands, depends upon his title to the money, and not upon the sheriff's having been guilty of a positive contempt, or intentional want of respect to the authority of the Court.

Bailey, for the motion, cited on the first ground 2 Bail., 28; on second and third ground cited 2 Bail., 128; 1 Bail., 337; Bail. Equity, *Izard* vs. *Izard*, 1 Bail., 158; 1 Hill, 69. On the fourth ground. If it appears (upon a rule) clearly the right of the plaintiff, the sheriff is in contempt if he does not pay over the money he has collected. 2 Hill, 502; 1 Bail., 605, Acts of 1839, sect. 19, 20, 21, Act concerning sheriffs, 1 Bail. Equity, 137.

Mr. Yeadon, contra, first ground, plaintiff was satisfied, 1 Tread. Con. Rep., 151; 2 Rice Dig., 275; Harp. L R., 389; second and third grounds. The plaintiff refused to indemnify the sale against the trust deed. The sheriff acted as agent of the trustees. The sheriff had no right to decide whether the deed was or was not void; fourth ground; cited 1 Con. Rep. Mills, 145; it was a question of right, 1 Hill, 145; 2 Rice's Dig., 272; Dud. L. Rep., 292.

Curia per BUTLER, J. The names of the parties in this case, were used to enable Dr. Buford to make a motion for his own benefit, and not so much for the purpose of punishing the sheriff, as to have the money raised by him properly applied. At the time the motion was made, Dr. Buford was equally liable with the defendant to pay the debt under the *fi. fas.* against both; against the one as principal, and the other as security. These were the oldest *fi. fas.* in the office, affecting the defendant, W. R. Scott's property, and if the money raised by the sheriff had been applied to them, they would have been entirely satisfied, and their liens extinguished.

*155] It is now too well settled to admit of controversy, that *a sheriff is bound to take notice of the liens in his office, and to pay money raised by him under official authority, to the oldest execution;

and when he pays money to a junior execution, he does so at his own risk, and will be held liable for the consequences, either by rule or action at law. His liability to be ruled, is explained and defined in the twenty-first section of the Act of 1839, page 30—"If any sheriff shall fail to execute and return final process in any civil suit, or to pay over money when demanded, that has come into his hands as sheriff, to the party entitled thereto, and shall be unable, on the return of the rule to be issued against him to show sufficient cause, he shall be liable to be attached for a contempt, and may be ordered by the Court in which such suit has been brought, to pay the debt and costs," &c.

The party entitled to the money, should always have it paid over to him when demanded. When there is a contest for the recovery by different *bona fide* contending parties, it is sometimes not very easy to say who is entitled to receive it. In such cases, the sheriff should be regarded as a stakeholder, and should hold his hand until the adverse claims are subjected to adjudication. This he must do entirely in good faith, and without collusion with either party. In most cases of dispute, he can judge for himself; and when right, he will, as a matter of course, be protected by the judgment of the Court—and when he withholds money from a party entitled to it, he will not always be exempt from the summary operation of a rule, by showing in his return, that he had acted in good faith, and did not intend a wilful contempt of the Court. A rule will always go where the legal rights of the parties can be made to appear from a conceded statement of facts. But where the facts are disputed, and the law depends on their development, the parties should be left to their action at law, or should enter into a consent rule to make up an issue to ascertain their rights.

We think the sheriff was right in first satisfying the mortgages that were put in his hands, as they were older than the *fi. fas.* in his office, and operated as liens on some of the property sold. The mortgagees were present, and it seems, consented to release their lien, by taking the proceeds* of the property sold. It was competent for them to do so; and the sheriff, having acted as their agent, was justifiable in [*156 satisfying these claims in preference to the execution creditors. After satisfying the mortgages, the balance of the money in the sheriff's hands should have been paid to the oldest execution—provided it was raised by the sale of the defendant's own property. For I think it would be in the power of a third person to suffer his property to be sold, to pay the debts of the defendant in execution. In such case, he could pay the junior execution in preference to the senior *fi. fa.*, and could, if there should be a surplus, direct the disposition of the balance in the sheriff's hands to his own use. I understand from the return of the sheriff, that he appropriated the money arising from the sale of Rose and her children, to a junior execution, at the instance of J. T. Scott, who claimed the negroes as trustee. That is, as legal owner of the property, he suffered it to be sold to pay the debt of W. R. Scott, upon the ground that his legal title was not perfect till that debt was paid. But he contends, that as it regards this judgment of which Dr. Buford is assignee, Rose and her children never were, in fact, liable to its lien. Whether the trustee is right or not, I shall not undertake to determine; that depends on facts which are contradicted, and principles of law applicable to them. The

position taken by Dr. Buford's counsel may be well founded, and I do not say that it is otherwise; it is not, however, entirely free from doubt —for if it were, I would not hesitate to enforce the rule against the sheriff, notwithstanding his return. An unquestioned right may as well be protected by rule as by action. The ground taken is, that the plaintiff's execution should be presumed, and even regarded as paid, from the fact that the sheriff knew of it, and satisfied a junior lien from the sales of defendant's property. This would be the case if the property was defendant's at the time of sale, and was sold by the sheriff *in execution*. It may be, that the deed to J. T. Scott was fraudulent as to all the creditors of W. R. Scott, as well as to Chandler & Graham, whose junior execution has been satisfied.

157] The deed was voluntary, and may have been fraudulent—but not necessarily so, from the fact of its being voluntary. That must depend on the circumstances and situation of the donor at the time the deed was executed. The general presumption would be, that it was fraudulent as to all prior creditors. If it should turn out otherwise, upon a full investigation of the facts, it would show that the motion was premature, and should not be granted—it not being right to make one person's property pay another's debts, because it was sold by the sheriff. The right of the trustee to direct the application of the funds in the sheriff's hands, depends both on the fact of his being the *bona fide* owner of Rose and her children, and of his subjecting the property to sale at his own instance. If the affirmative be true, the sheriff might be regarded as the trustee's agent to raise money for another's benefit. Prudence, at least, requires that we should not deprive the parties of an opportunity of litigating their claims according to the common course of the law; or to have an issue made up to try the question involved in dispute. In this view of the subject, the Court think that the motion should be granted, and an issue is directed to be made up to try the question, whether the money in the hands of the sheriff should not be applied to the payment of the judgment of *Cooper* vs. *Scott*. In that issue, Dr. Buford is to be the actor, but must proceed in the name of G. W. Cooper, the plaintiff on the record, or in his own name, as assignee, if he be in fact the assignee of the judgment.

Richardson, O'Neall, Evans and Wardlaw, JJ., concurred.

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*158] *Faulkner & Rogers *vs.* The Augusta Insurance Company.

A party insuring goods, &c., with an insurance company, is not obliged to demand payment of the contributors, before bringing suit against the insurers.

Tried before Earle, J., at Charleston, June Term, 1841.

This was an action on a policy of insurance, made in Charleston, and dated 7th April, 1840, by which the defendants underwrote $6,270, on goods per schooner Estell, at and from Charleston to Mobile. It was proved that the Estell, on the 20th April, 1840, struck on the Florida

Reef, and was taken off by the wreckers, carried into Key West, and libelled for salvage, and part of the goods sold to pay the salvage and expenses. On the arrival of the vessel at Mobile, the captain took an average bond, in which Harrison & Blair, the agents of the plaintiffs, joined. The average was adjusted by Mr. Stringer, an insurance broker —the plaintiffs were credited with $1,735 34, as their loss, being the amount of their goods sold, and charged with $879 52, for their contributory part of the average; the difference between those sums, say $855 82, was the amount to be contributed towards the $1,735 34, by the ship and the other owners of merchandise.

No measures were taken to recover the contribution, and the captain of the Estell sailed without settling, but on the 1st July, 1840, a demand was made on the defendants, and this action brought to recover the total amount of the loss.

The defendants proved, that in this place the custom in such cases is, to receive from the vessel and owners of the cargo their contribution, and from the insurers the balance, which is the average loss.

His Honor charged the jury, that the plaintiffs were entitled to recover from the insurers the total loss, and were not obliged to wait for the adjustment of the average, and the jury, under the instructions of the Court, found a verdict for the plaintiffs for $1,735 34, with interest from 1st September, 1840.

The defendants moved to set aside the verdict, and for a new trial, unless the difference between $1,735 34, and $879 52, be remitted, on the following grounds:

*1st. That the loss of the plaintiffs was a general average, and the amount was $879 52. [*159

2d. That the insured had an ample remedy for the recovery of the contribution due to them in Mobile, and would have recovered if they had not been insured. But if they, or their agents, suppressed the demand against the vessel and cargo from favor, it was a fraud on the insurers; and if they did so from negligence, the consequences of their neglect should be borne by themselves; and that the verdict should have been for $879 52, and no more.

Curia, per RICHARDSON, J. This case presents but one question of law: were the insured obliged to wait for the adjustment of the average loss; or to demand the contribution of the other shippers, or in any way to pursue the contributors, before demanding the total loss of their own shipment, against the insurers? No doubt is entertained that such loss is embraced by the policy. The question is upon the condition and time of demanding it. And as little question is made, that either the insured or insurers may recover of the other shippers, their respective contributions according to the adjustment, made and average bonds taken in this case. But each of the present parties would avoid that alternative, and put it upon the opposite side. Which has the legal right to choose? This question is for our adjudication. Little argument can be drawn from the conduct of the captain of the vessel. He, in case of loss, is the agent of all concerned. 2 Mass. 561. Until abandonment, in all cases, the goods saved remain the property of the insured, and he is, of course, bound, in justice, to do what he can to diminish the ultimate loss of the underwriters; (Mass. 614,) the true and unavoidable loss being all he is entitled to. But when the loss has occurred within the policy, it becomes

the loss of the underwriters: and the right to recover vests, in the insured. Both the right and liability are in virtue of the policy, which is a contract of indemnity; and they both follow at the moment of the loss. Can, then, this right or liability be suspended by the obligation to do what may be done for the insurers, in a matter which may be done as well by themselves? The average bond is taken in order to divide the loss. To decide *whose is the loss, decides which party is *160] obliged to pursue the contributors for his own interest and necessity. It is true, that the insured may do so. But it does not follow, that he has his immediate right to indemnity from the insurers suspended, unless he does so. Like all men who have two remedies, he make take either, at his own discretion, or even pursue both, until indemnified by one or the other. But no further. This is a general principle of the common law, and must have its influence upon all contracts which are submitted for their mere legal intendment, or constructive obligations. Again: the right of the insured to demand contribution of the other shippers, arises from his right of property in the goods lost, for the common good of all the shippers. It is independent of the policy, as in the case of jettison, where there is no insurance. But if there be any insurance, the insurers come in for the ultimate benefit. As to the authority of decided cases, and the opinions of respectable jurists, they leave the question very open for the judgment of the Court. In New York and Massachusetts, (1 Carne's, 212; 1 Johns. 412; 6 Mass. 318,) it has been decided in favor of the right claimed by the insured, to demand indemnity of the insurers, immediately. Chancellor Kent recognizes this as the proper rule of law. And Abbott, page 396, informs us that, in England, the average loss is commonly paid in the first instance, by the insurers. These authorities have weight on the other side. In Pennsylvania, (4 Bin. 502,) the same question has been ruled in favor of the insurers. The insured, in the first instance, is to demand the contribution, and some jurist recommend this as consonant to justice, from the usual position of the insured, and the obligation to do all that can be done for the insurers. It could, therefore, be scarcely an error, were we to decide, from mere authority, for either party, in order to lay down the general rule which the Court has now to do. But looking at the strict, legal right of the insured, and to the unquestionable liability of the insurers upon the policy, as a contract of indemnification to the former, the Court does not perceive how the insured can be suspended in their right of action, by the mere qualified obligation first to demand contri- *161] bution of the other shippers. This is often *done from self-interest, or justice to the insurers. But in many instances, the obligation to do so might be inconvenient—perplex with suits, and impede the very object aimed at by the policy of insurance—immediate reimbursement of the insured, in the value of the goods lost. In order that the voyage might not be retarded, or its fruits lost, which would be contrary to the general ends of insurance, to extend commerce and advance its success. And these are to be answered by the immediate reimbursement promised by the insurers. I would think, therefore, that the adjustment of average loss among the different shippers, and the average bond, are to be considered as a counter indemnity to the insurers, after paying the whole loss. And that this view of their office

gives the foundation of the true rule; that the insured are not obliged to demand payment of the contributors, before suing the insurers.

The motion is therefore, dismissed.

O'NEALL, and EVANS, JJ., concurred.

WARDLAW, J., dissenting. I dissent from the opinion of the majority of the Court.

It is contrary to the good faith required in all contracts of insurance, for the insured to put the underwriters in a worse condition than the insured would have been in, if no insurance had been made. The excess of the plaintiffs' goods sold for salvage, over their share of the average was in truth an advance made by them for the other shippers; and the average bond taken by the master, the common agent, was a mutual covenant, signed by all the persons concerned, binding themselves to pay each his contributary share of the average on demand. The agents of the plaintiffs, when they and all others concerned, were together in the port of destination, after adjustment of the average, do not appear ever to have made a demand, but have contented themselves by sending the adjustment and average bond to the underwriters, looking to them for entire indemnity. The underwriters may pay and may recover from those bound to make contributions, by suits in the name of the plaintiffs, but now that the shippers are separated, what hope is there for the underwriters that *they will be able, at reasonable expense, to procure remuneration? A demand by the agent of the plaintiffs, at the [*162 time when they should have made it, might have effected complete justice without expense or circuity; and I think that, without showing that this demand was ineffective, or was in some way excused, the plaintiffs should not be permitted to recover from the underwriters more than their share of the average. 2 Marshall on Insurance, 547; 2 Phil. on Insurance, 127.

BUTLER, J., concurred in the dissenting opinion.

Petrigru and *Lesesne*, for the motion. *H. A. De Saussure*, contra.

EDWARD MENLOVE *vs.* SAMUEL & Z. B. OAKES.

Where one of two parties, or joint contractors, was served with a writ in the State of New York, and judgment by the statute of New York was obtained against both; afterwards, suit was brought in South Carolina, against the party not served. *Held*, that the defendant in South Carolina, was not concluded by the recovery in New York; that it was only *prima facie* evidence of the extent of his liability, but that he might avail himself of any defence, which he might have had to the original cause of action. It was further held, that the judgment, outside of New York, was the same as if no judgment had there ever been pronounced against the defendant, not within her jurisdiction; that the party must fall back on the original cause of action; and that the statute of limitations, which is the "*lex fori*" would then be a bar to the plaintiff's cause of action.

Before O'NEALL, J., at Charleston, May Term, 1840.

This was an action of debt on a judgment recovered *in New York*,

under the following circumstances The note upon which the judgment was based, was a joint note. The defendant Z. B. Oakes, was alone served. By the law of New York, in a suit on a joint contract, if one of the parties be served, the plaintiff may proceed to judgment against both, and have execution against the joint *goods of both, and may so levy it, or of the goods of the party served Against *163] the party served, the judgment is declared to be final and conclusive, but to the party not served the right is reserved of making any defence, which he could to the original cause of action. Under this statute, it has been held in New York, that an action of debt would lie against the party not served, on the judgment, but that he could make to it any defence which he might to the original cause of action.

The defendant, Samuel Oakes, pleaded *specially*, the circumstances under which the judgment was obtained, the law of New York, and statute of limitations. It appeared that in 1834, the note on which the recovery was had, was in the hands of the plaintiff's counsel for collection; that defendant then promised to pay it. The judgment in New York was recovered in 1839, and this suit was afterwards brought. The presiding Judge was of opinion, that the plaintiff could not recover against Samuel Oakes; and ruled, that as to him, the plaintiff's action stood upon the same ground, as if it was upon the original cause of action, and as against that, the statute of limitation would protect him. Upon the Court's expressing these views, the plaintiff's counsel submitted to a nonsuit, and moved the Appeal Court to set it aside, upon various grounds, which will be fully understood by the opinion of the Court.

Mr. Thompson, for the motion. Cited and relied on 2 Rev'd. Stats. N. Y., 377; 6 Cow., 695. 6 Wend., 206; 6 J. R., 97; 2 J. R., 87. Could the defendant, Z. B. Oakes, in New York, plead the statute of limitations? cited 2 Bail., 217; 1 Hill, 439; 1 Faust, 214, declares suits against a partnership good, when one is out of the jurisdiction, and the other is served within the State. The original contract is merged; 18 J. R., 459; 1 Bail., 242; 1 Wend., 311; 1 Wash. Circuit Court decisions, 17; 2 Pet. Dig., 545; 13 *Ib.*, 312.

Mr. Frost, contra. Said, what is the effect of a recovery, against the partnership, where one was not served? In *Miller* vs. *Miller*, 1 Bail., 242, the rule is, clearly, that a party can only be concluded who is served, 9 Mass., *462. It is com- *164] petent for the Court to inquire, as to the jurisdiction, both as to subject and party; cited 13 J. R., 192. What is the effect of the judgment in New York? According to the course of common law, none but a party properly in Court is concluded.

In outlawry, although judgment, it is not a confession, 2 Sell., 277; Plow, 941; 1 Wils., 78; 1 Stark., 161; 22 Wend., 266. The Act of New York was in the place of outlawry. It should be construed as our own act, upon the same subject. It obviates the effect of non-joinder. 6 Stat. at Large, 211, repeals the former.

Curia, per O'Neall, J. The statute of New York, 2 Revised Statutes, 377, provides in its first section, that "in actions against two or more persons upon any joint obligation, contract or liability, if the process issued against all the defendants, *shall have been duly served upon either of them*, the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants, in the same manner as if all had been served with process."

In the second section, it is provided, "such judgment shall be conclu-

sive evidence of the liability of the defendant, who was personally served with process in the suit, or who appeared therein, but *against every other defendant, it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence.*

The 3d and 4th sections are intended to so regulate the execution to be issued under such judgment, as to give it full force and effect against the defendant served, but to protect from its operation the defendant not served in person and property, except so far as he might be interested in property belonging, in partnership, to him and the defendant served.

Reading the statute without the aid of note or comment, I do not perceive how there ever could have been a dispute, that as against the defendant, the judgment was anything more than one in form, and that in substance it concluded nothing against the person not served. For the provisions "against every other defendant, it shall be *evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence," plainly shows, that it was intended only as a final judgment against the defendant served, and that every thing was left open against the other. If this was not so, why was it provided that it should not even be evidence of the extent of the plaintiff's demand, until after his liability was established by evidence? This was putting the plaintiff to prove his case from the beginning. When this is so, there can be nothing like a judgment in its appropriate legal sense. For, according to that, it is the final evidence of the Court on the rights of the parties. Here, however, the whole matter is yet to be sifted, before the Court can decide that the defendant is at all liable. Referring, however, to the New York cases, and being governed by them alone, I apprehend that the same result will be obtained. [*165

In *Carman* vs. *Townsend*, 6 Cowan, 695, and 6 Wend., 206, it was ruled by the Supreme Court and Court of Errors, that on such judgment, an action of debt might be maintained against the defendant not served. That this conclusion was adopted, more to save a remedy to the plaintiff against the defendant, than any thing else, is apparent from the reasoning of Chancellor Walworth, in the Court of Errors, (6 Wend., 209.) For he holds, that the original promise was merged in the judgment, and hence, if the plaintiff could not maintain in form an action of debt founded on the judgment, he would be without remedy. After examining the subject, he concludes "the legislature unquestionably had no other object in view, than to save useless expense, and at the same time, to protect the rights of the absent defendant in that suit, without discharging his liability to the plaintiff, in an action on the judgment." He then goes on to answer the objection, that this conclusion would deprive the defendant of his defence, and remarks, "it has never yet been decided, that by a course of pleading, adapted to the particular case, the defendant, who is arrested in a suit on such judgment, may not avail himself of any defence, which it would have been competent for him to urge in the original action, had he been brought into Court."

*In *Halliday* vs. *M'Dougall*, 22 Wend., 270, the Chancellor said, "when an action is brought against several persons, as joint debtors, all of whom appear and deny their joint indebtedness, the plaintiff is obliged to make out, by legal evidence against each, not only [*166

that he is personally liable for the debt, but also, that he is jointly liable, with all his co-defendants; but when part of the defendants admit their individual and joint liability, either by their pleading or otherwise, or when they are outlawed, or proceeded against as absentees, by a return of the capias, by the sheriff, as to them not found, *or that no personal judgments can be rendered in the suit against them, on their individual property, the plaintiff is only to produce evidence, which will be sufficient, as against those who appear and defend the suit, to establish their joint liability, with their co-defendants.*

After these expositions of the statute, by an eminent New York jurist, sustained by the Supreme Court and the Court of Errors, I do not perceive how it could be pretended *there*, that the defendant not served, when arrested, could not plead the statute of limitations to the action. For it is a defence, showing that the defendant is not now liable to be charged with the original debt. It is a matter not at all concluded by the former recovery. For the party now setting it up, was not before the Court, and it follows, if it was not necessary that there should be proof in the former suit to charge him, none of his rights can be, by the conclusion of that suit, in any way affected. But when to this is added, the fact that the statute was intended merely to enable the plaintiff at law, to collect his debt, if he could, out of the parties served, but at the same time, to protect the rights of the absent parties, there would seem to be no room to doubt, that by proper pleading in an action of debt on that judgment, in the State of New York, any defence might be set up by the defendant, not served in the original case, which it would be competent for him to make to that case, if it was now to be tried. Indeed, I think, the true view in New York, is to regard the defence by the defendant, to the action on the judgment, in the same point of view, as if the original action was trying, *and considered as commenced against the defendant when he was served with process.

*167]

But, be this as it may, it is very clear, that the judgment thus obtained in New York, can have no extra-territorial effect. For, as against the party not served, it cannot be regarded as a judgment, further than as a mere means by which the partnership effects in New York, are made liable to the joint debt. In this respect, it is analogous to judgments in attachment, or decrees pro confesso, against absent defendants in equity. The principle here advanced, is very fully illustrated and enforced in *Miller* vs. *Miller*, 1 Bail. 242.

In *Buckner* vs. *Archer*, 1 McMull., 85, 86, where the question was as to the validity of an Ordinary's decree, against a defendant residing out of the State, Earle, J., in pronouncing the judgment of the Court, said, "it is essential to the validity of a judgment, that the Court should have jurisdiction *of the person and the subject matter*. When such is the fact, the judgment is conclusive between the same party and those in privity with them, upon all the matters in controversy, which it purports to have decided. But I apprehend *the want of jurisdiction* may be set up against a judgment, whenever it is attempted to be enforced, as a new and substantive cause of action, or where a benefit is otherwise incidentally claimed under it.

In *Lesterjette, Ordinary*, vs. *Executors of Ford*, 1 McMullen, 86, note, which was an action on an administration bond against the surety—

the principal (the administrator) was absent from the State—it was attempted to charge the surety upon a decree in Equity, obtained against the absent defendant, by publishing a rule. It was held, that the decree could only operate upon the matter in dispute, on the property of the absent defendant, within the State. In that case, it was said, at page 87, "for as to the defendant himself, so long as he remains beyond the jurisdiction of this Court, it cannot be enforced by any action on it, in another State."

From these cases, it may be reduced as a settled principle, that a judgment like the one before us, is, outside of New York, the same as if no judgment had there ever been pronounced against the defendant, not within her *jnrisdiction. So considering the case, the party must fall back on the original cause of action; and then there is [*168 no doubt, in any way in which it may be put, that the statute of limitations, which is the "*lex fori*," is a bar to the plaintiff's action. The motion is dismissed.

RICHARDSON, EVANS, EARLE, BUTLER, and WARDLAW, JJ., concurred.

As to the statute of limitations affecting the judgment of another State, see *Napier* vs. *Gidion*, in Errors, Sp. Eq., 215. *An.*

WM. MOORE, ASSIGNEE, *vs.* J. C. BURBAGE.

Where there has been a general demurrer to a plea, and a joinder in demurrer, and the demurrer has been sustained, leave will not be given to plead over.

Before EARLE, J., Horry, Fall Term, 1841.

This was an action of debt, on a single obligation by the the defendant, to pay Joseph A. Burbage, or order, the sum of six hundred dollars, and assigned to the plaintiff; *plea*, that the defendant had paid up the sum of money, and discharged himself from the said obligation, according to the tenor and effect of the same. That the said obligation was given to the said Joseph A. Burbage, to pay to one James R. Burbage, which said sum of money the said Joseph A. owed to the said James R., and that he, the said defendant, has paid to the said James R. Burbage, the said sum of money, according to the contract of the parties, when the said obligation was made by this defendant. Demurrer to pleas and joinder in demurrer. The plea was overruled as insufficient; and thereupon, the defendant moved for leave to plead payment, (*solvit ad diem de novo*,) which was refused; and the plaintiff had judgment to recover his debt, with the interest and costs.

*The defendant gave notice that he would move the Court of Appeals to *reverse the judgment on demurrer* in this case, on the grounds: [*169

1. Because the plea overruled was substantially a good plea of payment, and any defect in the form could only have been taken advantage of by special demurrer.

2. Because his Honor the presiding Judge, ought to have granted defendant's motion for leave to strike out the said plea, all besides the general plea of payment.

3. Because his Honor ought to have granted defendant's motion to plead over.

Curia, per O'NEALL, J. There can be no doubt that the defendant's plea was bad, on general demurrer. For if it had stopped at "that the defendant had paid up the said sum of money, and discharged himself from the said obligation, according to the tenor and effect of the same," this, although untechnically pleaded, yet, being in substance an allegation of "payment at the day," might have been sustained. But the plea went on to show how the payment was made, and stated a payment to one not entitled to receive; this clearly rendered the plea bad in substance, and hence the general demurrer was properly sustained.

But it is contended, that the motion to plead over or amend, ought to have been allowed. In *MacFarland* vs. *Dean*, Cheves 67, it is said "a judgment in special demurrer is nothing more than that the party against whom it is pronounced should plead over or amend, on payment of costs." This is a departure from the English rule. For there the judgment would be final, unless the party obtained leave to amend. The change is, however, necessary, under our free allowance of amendments, and hence it was thought advisable to consider special demurrers as opposing an obstacle of form merely, which might be obviated by pleading over or amending. This was, however, no great departure from the English precedents. For the amendment after special demurrer, joinder, argument, and even judgment thereon, was freely allowed by the English
*170] Courts, as will be seen by referring to *Halton* vs. **Walker*, 2 Stra. 846; *Pollyblank* vs. *Hawkins*, Doug. 330, and *Sexton* vs. *Robison*, Doug 620.

But after a joinder in general, demurrer, and judgment thereon, it may be laid down as a general rule, that an amendment will not be allowed.(*a*) In *Cates* vs. *Curreton*, Harp. Law Rep. 400, leave was given to amend after a joinder in demurrer; but that was after it had been ascertained the case could not be tried, and therefore no delay could follow from allowing it.

In this case, the trial was in progress, and to have allowed an amendment, or that the defendant should plead over, might have delayed the plaintiff by compelling him to seek for evidence to meet a defence, into which he knew, from the state of the pleadings at the commencement of the trial, the defendant could not go. This is a decisive reason why the amendment cannot be allowed.

In addition to that, we know from the facts stated in the plea, which has been ruled to be bad, of what the defence was made up. It is plain from them, that the payment alleged to have been made, could, never, in any shape, avail the defendant. There would be no propriety (if we thought we had the power) to allow an amendment to be made, which would present in form a good legal defence, altogether unsupported by the fact.

The motion is dismissed.

EVANS, BUTLER and WARDLAW, JJ., concurred.

Mr. Harllee, for the motion.

(*a*) See 10 Rich. 371, 94; 6 Rich. 27, 395; 5 Rich. 361; 4 Rich. 14, 23. Contra, 7 Rich. 432; 5 Strob. 157; 1 McM. 291; 1 N. & McC. 88, 108; 3 Hill, 197; Chev. 94.

*B. B. Sams *vs.* Albert Rhett. [*171

Plaintiff, one of the brothers of Francis Sams, (deceased,) paid to the defendant, attorney for the executors of the late Governor Hopkins, of Georgia, $815, who, it appears, had a judgment against the said Francis Sams, for $1031 31, with interest, from 18th February, 1818, besides costs. At the time of the payment of the money to defendant, by plaintiff, a compromise was effected between them, and this sum of $815, was to be considered as an entire discharge of the whole debt, or defendant was to procure from the executor an assignment of the case to plaintiff, as plaintiff might elect.

Subsequent to the date of the compromise, defendant, as attorney of the executors, assigned to plaintiff the case above alluded to, but plaintiff, after consultation with counsel, refused to accept defendant's assignment, as he was not the attorney, in fact, of the owner of the case, or even attorney on record in the case.

Defendant refused to become responsible for the amount paid, but promised plaintiff, that he would not pay over the amount he had received, until he procured an assignment to him from the executors of Hopkins. Some short time after this promise of defendant, to procure the assignment of the case, or that he would withhold the money, defendant paid over the money to the executor, C. H. Hopkins. Under the circumstances of this case, it was held, first, that this was a personal undertaking, on the part of defendant, and was founded on a sufficient consideration. It was held, secondly, that the cause of action, which accrued to the plaintiff, on the non-performance of this personal undertaking of defendant, was barred by the *statute of limitations*. More than four years having elapsed, from the payment of the money, by Rhett to Hopkins, and the bringing suit.

Before Wardlaw, J., at Gillisonville, January, Extra Court, 1842.

The following is the history of this case :

In January or February, 1836, Charles H. Hopkins, son of Gov. Francis Hopkins, late of Georgia, came to Beaufort, bringing with him the exemplification of a judgment, obtained November, 1823, in the Superior Court of M'Intosh county, Georgia, by John Floyd, Richard Richardson, John Carnochan and W. Carnochan, qualified executors of Francis Hopkins, against Francis Sams, for $1031.31, with interest from 18th February, 1818, and $12 costs, upon a bond made by Francis Sams, payable to William Robertson, and assigned to Francis Hopkins. As Charles H. Hopkins testified, he was authorized to take all proper steps for the collection of the debt ascertained by the said judgment, but it did not appear that he ever had a power of attorney. Francis Sams had removed from Georgia, and died in this State, before 1836. The defendant, then an attorney at law, under the name of Albert Moore Smith, was retained by C. H. Hopkins. A citation to procure administration of *the estate of Francis Sams, was sued out, and some [*172
proceedings were threatened against Louis Sams, and the plaintiff, B. B. Sams, brothers of Francis Sams. What interest these brothers had in the estate of Francis Sams, did not appear, except that C. H. Hopkins, in his testimony, spoke of the plaintiff's having received negroes, which he says were *smuggled* from Georgia, by Francis Sams. The plaintiff applied to Col. De Treville for counsel, and having been advised to pay nothing, resolved, notwithstanding to compromise, rather than permit any interference, by C. H. Hopkins, with the estate of Francis Sams.

Terms of compromise were accordingly adjusted between the plaintiff and the defendant, and the following agreement signed by them.

"*Beaufort, February* 9, 1836.

"EXECUTORS OF HOPKINS
vs.
FRANCIS SAMS.

"It is agreed between the parties, whose names are hereunto subscribed, that on condition of $700 being deducted from the whole debt in this case, and one-half the residue then relinquished, Dr. B. B. Sams shall pay the remaining half, and Albert M. Smith, attorney of ——— Hopkins, shall then give a general and entire discharge of all demands, in the said case, or, as the said B. B. Sams shall elect, an assignment of debt to him.

"ALBERT M. SMITH,
Attorney of Ex'or Hopkins.
"BERNERS B. SAMS."

Before the payment of any money, on 10th February, 1836, (as Col. De Treville fixed the date, by reference to papers,) the plaintiff and defendant came to the office of Col. De Treville, counsel for plaintiff; C. H. Hopkins not being present. The defendant then had in his hand the exemplification of judgment, with the following assignment annexed to it, viz.:

"EXECUTORS OF FRANCIS HOPKINS
vs.
FRANCIS SAMS. *Debt on bond.*

*173] "In consideration of the sum of eight hundred and fifteen *dollars, paid me in hand, the receipt whereof I hereby acknowledge, I assign all right, title and interest, which the plaintiffs in the above suit have, in the judgment obtained by them, against the said Francis Sams, (an exemplified copy of which judgment is hereunto annexed,) to Dr. Berners B. Sams, of Beaufort, South Carolina.

"ALBERT MOORE SMITH,
Plaintiff's Attorney.

"Witness, BENJ. R. BYTHEWOOD.
"*Beaufort, South Carolina, February* 10, *A. D.* 1836."

Col. De Treville being informed of the proposition to assign the judgment, but not knowing of any written agreement between the parties, (which he never saw or heard of, before the trial,) objected that the defendant was not attorney on record, that even an attorney on record could not assign a judgment, and that Charles H. Hopkins was only one of several persons interested in the judgment; and in the conversation that ensued, Col. De Treville asked of defendant, "Suppose Dr. Sams should pay, will you be responsible, if he should be called on again?" Defendant answered, "No, I won't do that; but, *I will promise not to pay the money over, until I procure a proper assignment of the judgment, or an assignment from the proper parties.*" It was then distinctly understood, that the money should be paid, and that an assignment should be procured from those who had authority to assign. Either from what was said, or as a legal inference, the witness, Col. De Treville, collected, that the assignment should be procured from those who had authority to assign, within a reasonable time, Col. De Treville, and as he believes, the plaintiff, understood in this conversation, that the defendant was acting for C. H. Hopkins, and that C. H. Hopkins, was one of the heirs of Francis Hopkins and in some way represented the executors of his father; although no authority was shown, or distinctly mentioned. But the plaintiff treated with the defendant, and not with Charles H.

Hopkins. The parties left the office: shortly afterwards, plaintiff returned, with a receipt for the money, and the exemplification, with the assignment above copied, annexed to it; and then, the plaintiff requested Col. De Treville to remember what *had taken place; and in consequence, the Colonel fixed it in his memory, and is very precise, especially as to the words of defendant's promise. On the 25th February, 1836, the defendant settled with C. H. Hopkins, and paid to him what C. H. Hopkins, (who lives in M'Intosh county, fifty miles from Savannah,) examined by commission, without mentioning the sum, says was "in full." A receipt given by C. H. Hopkins to defendant, was produced by the defendant, which showed a payment 25th February, 1836, on the judgment executors, *Hopkins* vs. *Francis Sams*, by defendant, to C. H. Hopkins, of $407.50, "in full." No notice of any payment seems to have been given to plaintiff; and C. H. Hopkins says, the settlement between plaintiff and defendant took place 25th February, 1836, at the voluntary offer of plaintiff, and that the defendant was authorized to accede to the terms proposed by plaintiff. [*174

It did not appear that any thing further occurred in the matter, until the summer of 1840. Some conversation, not proved, then took place between the parties; and in a conversation with Edmund Rhett, Esq., speaking of the assignment, and money paid, the plaintiff said, "mine is not a legal claim—I rely on his honor." On 20th July, 1840, the plaintiff sent by Mr. Ellis, to the defendant, the following letter, viz.:

"*To A. Rhett, Esq.*

"DEAR SIR:—You will oblige me by your final answer, (for which I before applied unsuccessfully,) to the following questions: Have you procured a regular assignment to me, from the executors of Francis Hopkins, or any other person duly authorized to make such assignment, of the judgment in the case entitled, the executors of *Francis Hopkins* vs. *Francis Sams*? If *you have*, be good enough to deliver it to the gentleman who hands you this; if you have *not* obtained the *assignment* of the said judgment, or cannot obtain it, have you paid over the money, which I deposited with you on the 10th February, 1836, to wit, eight hundred and fifteen dollars, to any, and what person, interested in the said judgment? If you have *not*, you will oblige me by *returning it to me*, as early as you can conveniently do so. Your answer to the above, you can *either commit to writing, or if you prefer, communicate it verbally to the gentleman who hands you this. [*175

"Your humble servant,

"BERNERS B. SAMS.

"*Beaufort, July* 20, 1840."

The defendant said to Ellis, that he had procured no assignment, besides that procured from Mr. Hopkins; and immediately afterwards, by some other hand, transmitted to the plaintiff the following answer, viz.:

"*Beaufort, July* 20, 1840.

"DEAR SIR:—Your note, through Mr. Ellis, I have received, and I returned a verbal answer; but it appearing, on a second perusal, somewhat more formal than such communications usually are, I think it best, for both of us, to put my answer into this written form.

"As I have told you before, I do not remember the transaction referred to as you do; but am sincerely disposed to use any influence I have with Mr Hopkins, to procure such another assignment of the judgment, as will remove your fears, wholly groundless and unnecessary, as I am convinced they are. You are really in no more danger of being compelled to pay the money again, than to discharge

the national debt of Great Britain. No law, with which I am acquainted, requires it of you. At the same time, I repeat what I have said from the first, that I acknowledge no legal claim on me, or claim of honor, to take any step in the matter. I will write to Mr. Hopkins, as soon as I get home. Politics, with one thing and another, have put it out of my mind till this time; but I have every disposition to respect your apprehensions, by doing all in my power to relieve them.

"I remain, very respectfully, your obedient servant,

"ALBERT RHETT.

"P. S.—This is the only answer Mr. Ellis is authorized to deliver you."

The plaintiff replied as follows:

"*To A. Rhett, Esq.*

*176] "DEAR SIR:—So much of your verbal answer, as satisfies *my first inquiry, viz.: "*That you had not procured any other assignment of the judgment, in the case entitled, the executors of Francis Hopkins* vs. *Francis Sams*, than the one which had already been given by Mr. Hopkins," had been delivered by Mr. Ellis, before I received your note. I regard it as a sufficient answer to the first question. In your note, I find no answer to my second question, which permit me to repeat. "Have you paid over the money, which I deposited with you on the 10th day of February, 1836, to wit, eight hundred and fifteen dollars, to any, and what person, interested in the said judgment?" Be good enough to answer this question, yes, or no.

"If you have not paid over the money, will you be *good enough* to acknowledge this as a demand upon you for the amount, to be remitted to me in any safe way you may please to select. Neither the probability of my being called on again by claimants under the judgment, nor the extent and nature of *your obligations* to me, are, in my opinion, proper subjects for discussion here. You must therefore pardon me for declining to reply to so much of your letter, as contains your opinion upon these points. Should you withhold, or deny me the information sought, I shall regard your silence as evidence that you *have* paid the money over; or that, still having it, although unable to obtain a *proper and legal assignment* of the above mentioned judgment, you refuse to return it to me.

"Waiting your reply, I remain, your obedient servant,

"BERNERS B. SAMS."

The defendant rejoined as follows:

"*Grahamville, July* 29, 1840.

"*Dr. B. B. Sams.*

"DEAR SIR:—I have no objection to answer, with perfect frankness, any and all of your inquiries, about your business, with the executors of Hopkins.

"But your manner of addressing me is not, as I conceive, sufficiently polite. You ought to know me well enough, not to forget, that if is not in your power, or that of any man, to draw from me anything at all in act or expression, while you *177] suffer your feelings to make you depart *from that style of courtesy, which it belongs as much to your own character, as a gentleman, to observe, as mine.

"You should remember, too, that in asking for information, it is but common fairness to state the purpose for which you want it. When you satisfy me that you have not intended to be rude, and as to the object you have in view by your interrogatories, I will return explicit answers.

"In the mean time, I remain your obedient servant,

"ALBERT RHETT."

This suit was commenced in August, 1840. The defence was rested on three grounds: 1. *Nudum pactum.* 2. That defendant contracted as agent, and incurred no personal liability. 3. The statute of limitations.

The Judge instructed the jury, that there was consideration for the parol promise, made in Colonel De Treville's office; that by it, the defendant bound himself individually, and not those whose claims he was

urging; and that from the time when this promise was broken by payment of the money, the statute of limitations commenced to run as to the amount paid; that if half only of the $815 was paid over, (which seemed to be the result of connecting the receipt with C. H. Hopkin's testimony,) then the recovery of half was barred, and as to the other half, the statute did not commence to run until the demand, after reasonable time for procuring the assignment. If, in the opinion of the jury, all was paid over, the whole recovery was barred.

The jury returned a verdict for the defendant. And from their verdict, the plaintiff appeals.

GROUNDS OF APPEAL.

1. Because his Honor charged the jury, that as to one-half the amount claimed, the Statute of Limitations commenced to run from the time the defendant paid it to Charles Hopkins, on the 25th February, 1836; and that if the proof had been sufficient, (and in his Honor's opinion, it was not,) that the whole, instead of one-half, had been paid over to the said Charles Hopkins, then would the plaintiff be barred as to the whole.

*2. Because the deposit of the money by the plaintiff, with the defendant, was made upon the defendant's undertaking not to pay it over, until [*178 he had procured a proper assignment of the judgment to the plaintiff. The payment of the money, therefore, by the defendant, to a person neither authorized to assign the judgment, nor entitled to the money, was no breach of contract, and of course the Statute of Limitations did not commence to run from that time.

3. Because the relation of the defendant to the plaintiff, was that of an agent to his principal; and the possession of an agent was not adverse until demand made; therefore the Statute of Limitations did not begin to run until then.

4. Because when the relation of the parties is of a fiduciary character, *notice* of the breach must be proved as to the plaintiff, before the Statute of Limitations will be a bar.

5. Because the defendant contracted to pay over the money to the plaintiff on a contingency, namely his failure to procure a proper assignment; and that, until he had informed the plaintiff, that he had failed to procure such an assignment, or it had come to his knowledge in some other way, no action would lie; and therefore the Statute would not run until then.

6. Because this was an action to recover back the consideration money of a void assignment, which was treated as a subsisting assignment by the maker of it, the defendant within four years before bringing the action, and therefore the Statute will not run.

7. Because to make it a defence to an agent, that he has paid over the money, it is necessary that the money should have been paid to the agent *expressly* for the use of the *person* to whom he has so paid it over.

8. Because the verdict was contrary to law, evidence, and the charge of his Honor, the presiding Judge.

W. F. Hutson, for the motion. 1. Argued, that taking the view of the presiding Judge to be correct, the jury erred in thinking the whole amount paid over; for, taking Mr. Hopkins' testimony, in connexion with the fact that the receipt produced is for exactly one-half the inference* on the mind of a lawyer is, that [*179 the defendant retained one-half for his fee. So it was not, in fact, paid over.

2. But, between principal and agent, in which relation the parties stood, the statute of limitations would not run until demand made. Co. Lit. 286; 2 Bail. 51; 1 Hill. Ch. 67; 1 Taunt. 572.

3. So, notice of payment over was necessary, before the statute would run. Godb. 160; 3 B. & A. 288.

4. But, as payment to a person not authorized to receive the money, would not be a defence to the action, neither can it be called strictly a breach of the contract,

for the contract is, "I will not pay over the money until," &c. But what is the legal construction I will not pay over *to the executors of Hopkins*. The payment to C. H. Hopkins, then, is no breach.

5. Again: It was an implied promise to pay over, on a contingency, namely, defendant's failure to procure an assignment; the statute would not, therefore, run, until the contingency, allowing a reasonable time to procure the assignment. 1 Wm. Black. 354; Godb. 437. Especially as the contingency suspended the cause of action. 2 Bail. 544.

6. But this may be treated as an action to recover the consideration money paid for a void assignment, treated by the assignor as a subsisting assignment within four years, in such case the statute of limitations will not run. 3 Moore & Scott, 219; 9 Bing. 748. The general rule is, the statute begins to run from the time when the party had a cause of action. The payment to Hopkins was fifteen days after the promise. Supposing the plaintiff ignorant of the payment to Hopkins, could he have sustained an action commenced on the 26th February? If not, the statute would not run until he could sustain his action. There is no promise to return the plaintiff the money; therefore, until he demanded it, he had no right of action.

Wm. E. Martin, contra, rested the defence on the following grounds:

1st. If any thing intended for a contract was entered into, it was *nudum pactum*. "The consideration in assignment must be such as the party promising has
180] power, by law, to perform, or cause to be performed." 1 Selwyn, p. 40. Mr. Rhett engaged to procure an assignment, but could not compel the parties, who were plaintiffs in the judgment, to execute an assignment. The case of an attorney engaged to procure satisfaction of judgment, (where it is said assignment will not lie, for after judgment the warrant of attorney ceases,) is analogous to the present. 1 Comyn. Dig. 326. The English Courts have also held assignment will not lie for failing to procure a bankrupt's certificate, for the same reason. Again; "a mere courtesy will not support assignment;" Buller, N. P. 145. "Agreement to do any thing on one side, without compensation on the other, is void in law." Comyn. on Con. 1, 9; Bl. Com. 445. A gratuity, intended as such at the time, cannot afterwards be made the foundation of a legal demand, as has been held in South Carolina also. To apply this, it will be seen, that if Mr. Rhett is to be considered Dr. Sams' agent, no compensation appears to have been given to Mr. Rhett; and Dr. Sams stated to Mr. Edmund Rhett, four years after the transaction, the foundation of this suit, in alluding to defendant, "Mine is not a legal claim, I rely on his honor." If, therefore, the council for appellant are right, in considering Mr. Rhett the agent for Dr. Sams, it is *nudum pactum*. See also, the note in 1 Selwyn. N. P. 36.

2d. If Mr. Rhett was not the agent of Sams, he must have been the agent of Hopkins, and the executors of Hopkins; in that case, having declared his principal, his agency being known, and being treated with as the agent of C. H. Hopkins, "one of the heirs of Francis Hopkins, who, in some way, represented the executors of his father," the principal *is liable, and not the agent. Caney* vs. *Webster*, 1 Strange, 480; *Mad* vs. *Hammond*, same, 505; *Borrough* vs. *Skinner*, 5 Burr. 26, 39; *Sadler* vs. *Evans*, 4 Burr. 1985, (considered a leading case;) *Bulle* vs. *Harrison*, Cowper, 568; 2 Kent, 492; 1 Livermore on Agency, 245, 246, 247, 249; Paley on Agency, 289, 304, 306, 308, 309; *Executors of Ashe* vs. *Livingston*, 2 Bay, 85: sustained in *Waddell* vs. *Mordecai*. Riley Coll. 17. (3 Hill. 22. *An.*)

3d. The statute of limitations is pleaded in both forms, "*Non ass't.* and *actio non*;" and the action is barred, if there ever existed the right of bringing it.
*181] When money is paid by mistake, or upon a consideration which has *happened to fail, the statute runs from the time the money is paid. 1 Esp. N. P. 157. (The money in this case was paid on 25th February, 1836, and suit begun in August, 1840.) In all cases of injury arising from carelessness, or negligence, the statute runs from the time of the act being done, from which the injury arose, and not from the injury, or the discovery of it. *Bree* vs. *Horlbeck*, Cowp. 654; *Howell* vs. *Young*, 12 Com. Law Rep. 107; *Battely* vs. *Falkner*, 5 Com. Law Rep. 288; *Short & McCarthy*, same, 403; *Troup* vs. *Executors of Smith*, 20 Johns. 33; *McDowall* vs. *Executors of Goodwyn*, 2 Mil. Const. Rep. 445; *Motley &*

Montgomery, 2 Bailey, 544; *Executors of Thomas* vs. *Executors of Ervin*, Cheves, 22. The appellant's counsel has argued that Mr Rhett stood towards Dr. Sams in a fiduciary relation, and that the statute will not run until some act is done by Mr. Rhett, to terminate the agency. This argument would well apply in the Court of Equity, particularly as the counsel treats the parties in the light of trustees and *cestui que trust*, when he contends that the statute runs only from the time of the discovery of the payment over. In the case of *Troup* vs. *Smith*, 20 Johns. 33, above referred to, it was held, the statute would run from payment over, whether discovered or not. It was argued, that the statute would only run from demand made in 1840; but this cannot apply, because the demand was not necessary to constitute a cause of action, which is the case when the statute runs from demand. The payment over was a breach, and gave cause of action. In the case of *Smith & Bythewood*, Rice, 245, the Court held, that when a note was payable on demand, the statute run from the first existence of the note; no demand, beyond the service of the writ, was necessary, and it was not even entitled to days of grace, though having no date. Again; this was a promise *indefinitely*, no time being fixed for its fulfilment; the party promising having it in his power to defeat the intention at will, (viz.: paying over the money for a different purpose from that intended,) and under the authority of the case of *McDowall* vs. *Ex'ors of Goodwyn*, 2 Mill's C. R. 441, the statute was a bar. There cannot be a doubt, that if the statute was not a complete bar on the 10th February, 1840, it must have been so on the 25th *of the same month and year, (the four years from payment over having elapsed,) and the suit was not commenced [*182 until August, of the same year.

Curia per EVANS. The written contract, dated 9th February, stipulates, that on the payment of a certain portion of the judgment, the defendant, as attorney of Hopkins, should give a general and entire discharge of all demands, or as the said B. B. Sams shall elect, an assignment of debt to him. From this agreement the plaintiff has certainly no cause of action against the defendant, for not procuring an assigment of the judgment. If any such right of action exists, it arises out of the verbal stipulation proved by Colonel De Treville, to have been made on the 10th February, the day after the written agreement was signed. That stipulation, as proved, was, "that he (the defendant,) would not pay the money over, until he procured a proper assignment of the judgment, or an assignment from the proper parties." We think with the presiding Judge, that this was a personal undertaking, and that it was founded on a sufficient consideration, to wit, the payment of money by Sams. A very slight matter, either of benefit on one side, or loss on the other, is a sufficient consideration to support a promise; so that the only question about which there is any difficulty, is, whether the plaintiff's action, arising out of this breach of contract, is barred by the statute of limitations. There is no doubt of the correctness of the principle contended for by the plaintiff's counsel, that as between principal and agent, the statute of limitations does not, in general, run, because there is no right of action until demand. The difficulty of the case is, to determine the precise relative position of the parties. I do not perceive there is any foundation for the main argument of the plaintiff's counsel, that, by the contract, Rhett was Sams' agent to buy an assignment from the executors of Hopkins. The money was not paid on any such contract as this. The money was paid on the contract of the 9th February, to Rhett, as the agent of Hopkins, upon his stipulation not to pay it over until he procured an assignment of the judgment. The plaintiff's complaint is not that the defendant still keeps the money, and,

*183] *therefore, the plaintiff has a right to recover it back, as paid on a consideration that he has not performed, but that he has violated his promise, and paid over the money, without procuring the assignment, according to his promise. The general principle is, that the statute of limitations begins to run whenever a cause of action accrued to the plaintiff, or, in other words, whenever the plaintiff can sue the defendant for a breach of his contract. Now there can be no doubt that when Rhett paid the money, in violation of his agreement, he was liable to action on his contract. It was broken, and the statute of limitations commenced to run from the day the plaintiff could have brought an action against him. But, it is supposed, no cause of action accrued to Sams, until he was informed of the breach of Rhett. I think it wholly immaterial, whether he knew it or not. If he did not, of which there is no evidence, except that it may be inferred from his letters, it was his misfortune, and he is not the first man who has lost his right of action by his own inattention to his business In this particular, the case is like *Executors of Thomas* vs. *Ervin.*(*a*) If the defendant had fraudulently got possession of the plaintiff's money, or had deceived him by misrepresentations as to its misapplication, that might, perhaps, have altered the case. The defendant is only bound by his promise. There is no pretence of any right to sue him on any other ground than a violation of his promise. More than four years elapsed after a cause of action accrued to the plaintiff, and we are of opinion, the plaintiff's action is legally barred. The motion is dismissed.

O'Neall and Wardlaw, JJ., concurred.

Butler, J. I am inclined to the opinion, that the defendant should be regarded as a bailee, and did not hold the money adversely until demand, and, therefore, could not avail himself of the statute of limitations.

Richardson, J. I dissent from the decision of the Court in this case. I think the defendant was bound to keep the money until he had obtained *184] for Dr. Sams a legal assignment* of the judgment from the executors of Francis Hopkins, or a legal acquittance from them. That, therefore, the payment of the money over to Charles H. Hopkins, was merely voluntary and gratuitous; and of course, until Dr. Sams had notice of such a transfer of the money to Charles H. Hopkins, or of a refusal to return it, or the defendant had procured the legal assignment of the judgment, he, the defendant, stood in the character of the agent, either to pay over the money to the executors, or to procure the proper assignment; and, therefore, the statute of limitations could not attach until after the correspondence of 1840.

(*a*) Cheves, 22. See *Clark* vs. *Reeder*, 1 Sp. 298. *Roxborough* vs. *Albright*, 4 Rich. 40. *Am.*

JACOB SMITH *vs.* C. J. T. SINGLETON.

In an action of trespass and assault and battery, where the battery has been committed by several, and a recovery had against one, such recovery may be pleaded in bar to an action for the same battery brought against another.

Before O'NEALL, J., at Beaufort, Spring Term, 1841.

The following is his Honor's report of the case:

This was an action for a trespass on the person of the plaintiff, committed by the defendant, Lucius C. Robert, and others. The plaintiff brought several actions, and at a previous term, recovered a verdict of damages against Lucius C. Robert, for the same assault and battery of which the plaintiff complained against the defendant, and on that verdict judgment was entered up, and was fully paid and satisfied. The defendant tendered to the plaintiff the costs of this action, and pleaded the recovery had by this plaintiff against Lucius C. Roberts, for the assault and battery of which he complained against him, and *averred [*185 that that recovery had been satisfied, and that he had tendered to the plaintiff the costs of this case. The plaintiff demurred generally.

I was anxious (if I had been at liberty to do so,) to sustain the demurrer. For the battery was, from what I learned in other trials, during the term, an erroneous one, committed by the defendant; Robert was only an aider and abettor in its perpetration. The recovery against him was, I think, for twenty dollars.

But, on authority, there can be no clearer proposition than that the plea was a bar to the plaintiff's action. In Buller's N. P. 2, (referring to Yelv. 68,) it is said, "so if a battery be committed by several, and a recovery had against one, such recovery may be pleaded in bar to an action for the same battery brought against another." In *Hawkins* vs. *Hatton*, 1. N. & M'C. 318, the point was presented for the consideration of the Constitutional Court. The opinion of the Court was delivered by Mr. Justice (now Chancellor) Johnson. He gave the following as the law on the subject: "It is unreasonable, that a party should have more than one satisfaction for the same injury; and although there may be several wrong-doers, and the party injured may maintain actions against them severally, yet each is liable for the whole entire damages sustained; and the law, abhorring a multiplicity of actions, will presume that the jury in any one of the actions, would give him damages to the extent of the injury, and forbids that he should prosecute a further remedy after there has been a satisfaction. But, until there is a satisfaction of the damages assessed, a recovery could not operate as a bar to an action against another of the joint trespassers; because it is possible, from the insolvency of the first defendant and various other causes, the plaintiff might never be able to obtain his redress. It was, therefore, clearly incumbent on the defendant to have averred a satisfaction in his plea of former recovery." In another part of the opinion, the Judge states the rule thus, "if there has been a recovery against one of several joint trespassers, the plaintiff may proceed against the others, until there is a satisfaction of the damages recovered against some one of the defendants; and if he elect, as he *may do, to the satisfaction of any one of the [*186 judgments, the Court will, on the payment of the costs in the

other cases, order satisfaction to be entered on all the judgments." This statement of the rule gave rise to the notion, that before the plea of the former recovery, averring satisfaction, could be sustained, it must also aver, that the case pleaded to, had been tendered; and in the subsequent stage of the case of *Hawkins* vs. *Hatton*, that very objection was presented and sustained at *Nisi Prius*, and the decision was unquestioned by appeal. The rule, as now recognized in practice in this State, is stated in *Park* vs. *Hopkins*, 2 Bail. 411, in the following words: "For a trespass, and other injury, *ex delicta*, which may legally arise from the joint act of two or more, the party injured has the right to sue all the wrong-doers, jointly or severally as he may think proper. If he brings separate actions against each of them, a recovery against, and satisfaction of the damages by one, will, upon the payment of the costs in the other cases, bar a further recovery."

The plea conforms to all these requisites. The demurrer was overruled and there was judgment in bar for the defendant. The plaintiff appeals, on the ground that "there was error in ruling that the recovery in the suit against Lucius C. Robert was a bar to the suit against this defendant."

Martin, for the motion, insisted that notwithstanding the current of English decisions, they could not apply in this State, for this reason. In England, the damages against joint trespassers cannot be apportioned between the trespassers, according to the *degree of participation* of each—in this State they may be. (See first case in Bay, *White* vs. *McNeely et al.*) The reason for the rule not existing here—the rule of law should not, therefore, apply.

Hutson, contra. In addition to the cases referred to by the Court, in the report of the case, relied on *Cocke* vs. *Jenner*, Hobert, 66; *Cobbett* vs. *Barnes*, William Jones, 377; *Bird* vs. *Randall*, 3 Burr., 1353; *Livingston* vs. *Bishop, et al.*, 1 John, 291.

*187] *Curia, per* O'NEALL, J. This Court for the reasons given below, are satisfied with the decision; but as this case was attempted to be distinguished from the cases referred to in the report, on the authority of *White* vs. *McNeely* and others, 1 Bay, 11, it may be well enough to show that no such distinction can be allowed.

It is true, we early departed from the English rule, that in a joint action of trespass, the jury cannot sever in their damages. The case of *White* vs. *McNeely*, in 1784, ruled, that the jury in such a case might sever and apportion the damages according to the degree and nature of the offence committed by each defendant. The wisdom of such departure is, I think, very questionable; but it has been in practice ever since conformed to; and we are now asked to give it a further extension, by abolishing another well-settled principle, that in several actions for a joint trespass, a recovery against one defendant, the satisfaction of it, and the payment of the costs in the other cases, will bar any recovery against the other defendants.

It is supposed that this principle, and the consequences of a recovery in such a case as *White* vs. *McNeely*, cannot stand together. For it is asked if a recovery against one of several joint trespassers, and satisfaction, be a bar to a recovery against the others, why would not the payment of the damages found against any one of the defendants in a joint action, bar the collection of the damages found against the others? The answer is obvious—in several actions, the law supposes the jury to

find against any one, the entire damages sustained by the plaintiff, and therefore, satisfaction in one is satisfaction in all. But in a joint action, when the damages are apportioned, the aggregate of all the damages found is the damage of the plaintiff; and hence satisfaction by one, of his part, is not satisfaction for all, and of the whole.

The motion is dismissed.

RICHARDSON, BUTLER, WARDLAW, JJ., concurred.

See dissenting opinion in *Union Bank* vs. *Hodges & Smith*, 11 Rich. *An.*

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*JOHN PARKERSON *vs.* SIMONS & EPPING. [*188

Defendants, (chemists) were in the practice of filling a certain soda fountain for one Hopkinson, who rented this and another fountain from the plaintiff. Hopkinson absconded, leaving the soda fountain in the possession of defendants, who had first filled it. Plaintiff brought this action of trover for the conversion by defendants. *Held*, That there was no such tortious conversion, as would enable plaintiff to sustain trover, and a nonsuit was ordered.

Tried in the City Court, Charleston, January Term, 1842, before the RECORDER.

This was a process in trover for a soda fountain; it appeared in evidence that plaintiff rented to one Hopkins, two soda fountains; that Hopkins was in the habit of getting defendants to fill these fountains for him. The early part of last summer, Hopkins absconded, leaving one of these fountains in the possession of defendants, who had filled it. Parkerson demanded the fountain; his right of property was not disputed, but the defendants refused to deliver it up, claiming to have a lien for the filling.

It was in evidence that after the refusal and before suit brought, defendants said to Parkerson that he could have the fountain if he chose to call for it.

Plaintiff's counsel, however, stated in evidence that just before suit brought, he called on defendants, who said that the business must be legally settled.

Another witness stated that the contents of the fountain could have been drawn off by defendants and retailed by them without any loss.

The recorder thought the conversion proved, that the defendants had no lien for the filling, and decreed for the plaintiff the value of the fountain, say thirty-five dollars.

The defendants appealed, upon the subjoined grounds:

1st. Because the action being in trover, the plaintiff failed to prove a conversion of the goods in question, and ought to have been nonsuited.

2d. That the defendants having shown to the Court that they had a good and substantial lien upon the property in question, they were entitled to a decree.

3d. That the said decree is, in other respects, contrary to law.

**Mr. Walker*, for the motion. 1st. Where there is a lien and notice given, and no tender made, there can be no conversion. Mo. on Lien., 28; 125 At. [*189

2d. The fountains were hired, and there was no proof of the determination of the contract. Bac. Ab. Tit. Trov., 602.

Mr. Elliott, contra. The lien can only exist when the labor and material of the mechanic is mingled with the article.

Curia, per BUTLER, J. By a contract of hire the plaintiff had let one Hopkins have the soda fountain, which is the subject of this suit. Hopkins, while a retailer of soda water, and while he was the special owner of the fountain, placed it with the defendants, who were chemists, to have it filled. The defendants regarding the actual depositor as the true owner, filled the fountain with soda water, and contend that they have a right to retain it until they are paid for their trouble and expense in filling it. Whether they can do so or not depends on the nature of their employment, and their relation to the present plaintiff. They are chemists and are engaged in an employment requiring skill, labor and expense to carry it on. Soda water is prepared by disengaging carbonic acid gas from marble or lime stone by sulphuric acid; the gas thus generated is pumped with great care into a fountain containing water and soda. The water thus prepared is only valuable while combined with this gas, which will escape by the slightest exposure, and it must always be a difficult matter to draw off the water into another vessel without its losing its valuable quality; and the trouble of doing this would be greater than filling the fountain, and also with the risk of the water becoming valueless in the process. I understand that the filling of such a fountain as this would be worth from $5 to $8. Under these circumstances, had the defendants a right of lien on the fountain which they had filled? "Lien is the right of detaining the goods of another until some demand be satisfied." In what particular cases and against whom this right will attach, cannot be indicated with entire certainty and precision. It either arises by operation of law, or is created by express contract,* and may be general, or particular; particlar liens exist where persons have a right to retain possession, in respect of labor or money expended on the identical chattel which constitutes the subject of controversy. These are always favored by the Courts, (1 Atk. 228.) The case referred to was *ex parte Deeze*. The petitioner was a packer and had packed goods for Mr. Norton Nicholl, to whom he had also lent large sums of money. Nicholl had demands against Deeze, so that there were mutual accounts between them when Nicholl became bankrupt, and Deeze contended that he had a right to retain the goods packed until he was paid his demand by the assignees of the bankrupt. In giving his judgment the said Chancellor remarks: "To be sure, packers may retain goods till they are paid the price and labor of packing; and so other tradesmen may retain in like manner; therefore, these goods were in the petitioner's hands in the nature of a pledge for some part of the debt, that is, the price of the packing; and what right has a Court of Equity to say, that if he has another debt due to him from the same person, that the goods shall be taken from him without having the whole paid?" The goods themselves, in separate parcels, had no value imparted to them by the packer, they were not in any wise changed in their original character, as they would have been, if they had been dyed or printed, &c. They were merely put together for transportation from one place to another. The packer's labor about their packing gave him his lien. So of this soda fountain.

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Nothing was done to the copper vessel itself, but its contents gave it an additional value by the labor and skill bestowed on it by the defendants. They had lost their time and parted with their materials, and that upon the confidence that Hopkins would pay them before the fountain was removed. The plaintiffs take the ground that they are not to be affected by the contract between Hopkins and the defendants. They certainly gave Hopkins the right to use the fountain as his own while he had it in his possession. By their own act, the defendants have done work for Hopkins on a pledge which he had a right to make. They cannot exonerate him now from his liability under his contracts, or deprive defendants of any right or remedy incident to *or resulting [*191
from them which were fairly acquired. And whatever rights the defendants have, it was not pretended they did not acquire fairly. The defendants' lien must be respected rather at the time it was acquired, than suffered to be defeated by subsequent events, over which they had no control. We are of opinion that the defendants were not guilty of a conversion in retaining possession of the fountain in controversy, under the circumstances existing at the time the demand was made, and think that a nonsuit should have been granted, which is accordingly ordered.

RICHARDSON, O'NEALL, EVANS and WARDLAW, JJ., concurred.

H. Pinckney Walker, for the motion. *T. O. Elliott*, contra.

Lien. See 11 Rich., 279. *An.*

JACOB BARRETT *ads.* THE CHARLESTON BANK.

Where the endorser of a promisory note has secured himself against his liability, by an assignment or lien upon the whole, or a sufficiency of the maker's property as an indemnity, notice is not required to be given to him.

Tried in City Court of Charleston, July Term, 1841, Before his Honor the RECORDER.

The following are the facts of this case :

This was an action of assumpsit against defendant Barrett, as endorser of a promissory note of George W. Logan, for $900, dated 19th November, 1840, and payable sixty days after date. The defence, no legal notice of dishonor.

Wm. E. Hayne, sworn: Notary of the Bank; demanded *payment of this [*192
note at Logan's office, his place of business, after four o'clock of the day on which it was payable; he was not in; left a letter on his desk, demanding payment; then put a notice in post office to Barrett, giving him notice; Barrett lived on Charleston Neck.

George Gibbon, sworn. Has a bond and mortgage in his possession from George W. Glover to George W. Logan; was assigned to him in trust to secure Barrett's endorsements for Logan; Logan and Barrett came to his counting room, and had a good deal to say on this subject; witness told them if they designed to put anything into his hands, they must state the object in writing; the understanding was, that the bond and mortgage was to be left with him; and he understood, from the conversation, as a security to Barrett.

Wm. E. Hayne, recalled. Proved Barrett's handwriting; he met Barrett after

he had lodged the notice for him in the post office; he told him he had received it, but it was not regular, and he would take advantage of it; this was some days after the notice was left, and did not say when he received it.

Edward Carew, sworn. He heard a conversation between Boyce, the President of the Bank, and Barrett, and had a conversation with him, himself; Barrett did not wish to be sued on this note; he proposed to Boyce to see Logan, and proceed against him; and he would secure him in the ultimate payment of the note by stock, or any other security; his desire was to avoid a suit against himself; Boyce declined his proposition.

Evidence closed.

The defendant's counsel then moved for a nonsuit, on the ground, that there was no legal notice of dishonor given to Barrett, and there was no evidence of waiver of notice.

The Court overruled the motion, and submitted the case to the jury, and they found a verdict for plaintiff.

The defendant appeals on the grounds:

1. That there was no notice to charge the endorser.

2. That there was no evidence sufficient to warrant the presumption of a waiver of notice on the part of the endorser.

*193] *A. G. Magrath*, for the motion, said, there was only a single question in the case. He cited 10 J. R. 489; 4 Wend. 401. There is no doubt that where both parties reside in the same place, notice in the post office is not sufficient: 11 J. R. 180; 8 Ib. 180; 1 Bail. 419. A confession of judgment, as an indemnity to the endorser, is a waiver. The mere taking of security is not sufficient to waive notice. Funds must come into the hands of the endorser: 19 Wend. 421; 7 Ib. 169; 5 Mass. 170.

Petigru, contra, cited from 1 Mills. Cons. Rep. 381, and said the case from 1 Bail. 412 was conclusive of this case.

Curia, per EVANS, J. The undertaking of the endorser of a promissory note is upon the condition, that payment shall be demanded of the maker when the note is due, and upon default of payment, notice shall be given to the endorser. The object of this notice is to enable the endorser to protect himself against his liability by securing the debt from those who are liable to him. Hence the general rule is, that to charge the endorser, notice must be given; but this is not an inflexible rule, and wherever the reason of the rule ceases, it has been dispensed with. Thus in the case of *Corney* vs. *Dacosta*, 1 Esp. R. 302, where the endorser at the time of endorsement took effects of the maker into his hands equal to the amount of his liabilities, Buller, J., held he was not entitled to require demand or notice. The reason of this decision was, that having already secured himself there was no necessity for giving him notice. In the case of the *Mechanics' Bank of New York* vs. *Griswold*, 7 Wendall, 165, it was decided that the endorser of a promissory note, who, before the note fell due, took an assignment of all the estate of the maker to meet his responsibilities, which was ample security to him, was not entitled to insist on either demand or notice as a condition of his liability. In the case of *Bond* vs. *Farnham*, 5 Mass. 170, before the note became due the maker became insolvent, and the endorser took from him an assignment of all his property to secure himself against this and other liabilities. It was held he was not entitled to notice, although the

*194] *property assigned was insufficient to secure him against all his liabilities; but it secured all the maker had, and he could have obtained no other security even if notice had been given. So also in the

case of the *Bank* vs. *Myers*, 1 Bailey, 419, Myers took a confession of judgment from Cohen to secure himself against his liability as endorser on the note of Cohen. This was held to be a waiver of his right to notice.

The principle to be deduced from these cases is, that when the endorser has secured himself against his liability, by an assignment or lien upon the whole or a sufficiency of the maker's property as an indemnity, notice is not required to be given to him. How does this case stand with these principles? It appears from the evidence of Mr. Gibbon that the endorsement of this note was a subject of negotiation between the maker and Barrett before he endorsed; the result of which is set out in the following letter:

CHARLESTON, July, 1840.

Messrs. *Geo. & John Gibbon*:—

Gentlemen:—Herewith I deliver you a bond of G. W. Glover in my favor, with my endorsement in blank thereon, dated 14th February, 1840, conditioned for nine hundred dollars and interest, secured by mortgage of a house and lot in Hasell street, which I deposit with you in trust as collateral security for the endorsement by Jacob Barrett of my note at same date, nine hundred dollars, and for the endorsement by him of the future renewal or renewals of said note; on non-payment by me of which note or any of its renewals you will please deliver over the bond and mortgage to Mr. Jacob Barrett, and take his receipt for the same. Respectfully,

GEO. W. LOGAN.

I understand from this evidence, that the delivery of the bond and mortgage to Gibbon, in trust, to be delivered to Barrett in case of Logan's failure to pay the note or its renewals, was the condition upon which Barrett agreed to endorse the note. Upon the security being given he was *willing to endorse and did endorse Logan's note. If he had not regarded the security as ample, he would not have done so. [*195 His case rests on the same principle and is not distinguishable from the cases cited above. It seemed to have been conceded in the argument, that if the bond and mortgage of Glover had been of the whole estate of Logan, then on the authority of the cases cited from Wendell and Massachusetts Reports the decision was right in the Court below. But I apprehend the cases cited do not depend on that circumstance, but on the fact that the security was ample or all that could be obtained. The case of the *Bank* vs. *Myers* did not depend on the fact, that it covered all the property. The security in that case was a confession of judgment, which certainly does not create a lien on all of the defendant's property; choses in action, which constitute a large part of the wealth of commercial men, are not reached by either judgment or execution. It seems to me that Barrett, having taken what he considered ample security against his liability on his endorsement, and, in the absence of any proof to the contrary, we must suppose it an ample indemnity, has waived his right to insist on notice of nonpayment by the maker, and the motion must therefore be dismissed.

O'NEALL, BUTLER and WARDLAW, JJ., concurred.

*196] *E. C. Keckley *ads.* Thos H. Harris, Adm'r.

1. Where the agent of a landlord, under his own hand and seal, issued a distress warrant against the goods of the tenant, and constituted a third party, as bailiff to levy the warrant, it was held competent for the landlord to come in and substitute himself for the agent on the record, and avow for rent in arrear.
2. A replevin bond, given to the sheriff by a party, to prosecute his action in replevin to judgment, is assignable, and the surety thereto is liable to the same extent that the principal would be.

Before Earle, J., at Charleston, May Term, 1841.

This was an action against the defendant, as surety of a replevin bond. The pleas were *non est factum*, and *nul tiel record*. The declaration set forth a distress *by plaintiff*, of the goods of one David Clayton, that Clayton had replevied on plaint of a wrongful distress *by plaintiff*, and bond with the usual condition, and defendant as surety, to prosecute his suit with effect "*against Henry D. Lesesne*, agent of Thomas H. Harris, administrator, and John A. Buckheister, (the bailiff,) that plaintiff avowed for rent, obtained judgment and issued execution, and that the goods replevied were levied on and sold under execution, and brought less money than the rent and costs; whereupon the sheriff assigned the bond *to plaintiff*, and whereby an action accrued to him against defendant, for the residue of the rent and costs. To sustain his declaration, plaintiff produced, 1. An affidavit by Henry D. Lesesne, as his agent, swearing to rent due to plaintiff. 2. A distress warrant, signed and sealed, not by plaintiff, but by Henry D. Lesesne, and he not signing and sealing in the name of his principal, "thus, Thomas H. Harris, seal, per Henry D. Lesesne, agent," but describing himself as agent, and putting his own seal, thus, "Henry D. Lesesne, seal, agent of Thos. H. Harris, administrator," and in the body of the warrant, he as agent, and not in the name of his principal, appointing the bailiff to levy for rent alleged to be due, not to his principal, but to himself as agent. 3. The original replevin writ, sued out by Clayton, which made plaint of an unlawful distress, not by plaintiff, as alleged in the declaration, but by Lesesne, as agent, and Buckheister as bailiff, and was served on them, and not on *197] plaintiff. 4. The original declaration in replevin, counting *on an unlawful distress, not by plaintiff, but by Lesesne and Buckheister. 5. A confession of judgment by Clayton, on the back of *the declaration*, for the rent due and destrained for, with interest and costs, waiving all errors, and consenting to an immediate signing of judgment, and issue of execution. 6. The original replevin bond, conditioned to prosecute the replevin suit, with effect against Lesesne, as agent, and Buckheister, and not against plaintiff, or return the goods, and in default or in case the goods returned should be insufficient to pay the rent, and expenses, then to pay the same or the deficiency, as the case might be. 7. An avowry, not by Lesesne, the defendant in replevin, but by plaintiff who was no party to the replevin suit, on a separate paper, for rent due plaintiff. 8. A judgment entered up on the confession of Clayton, not in favor of Lesesne, the party, but of Harris, a stranger to the suit. 9. A *retorno habendo cum fi. fa.* against Clayton, directing the sheriff to cause return of the goods replevied, not to Lesesne, the destrainer and

defendant in replevin, but to plaintiff. 10. The return of the sheriff, that he had levied and sold the goods replevied, and of the proceeds of sale, insufficient to pay the rent. 11. An assignment of the replevin bond, not to Lesesne, but to plaintiff. On this evidence plaintiff closed and rested his case, and defendants' counsel moved for a nonsuit, on the grounds:

1. Of variance between the declaration and the proof.
2. Of incurable irregularity in the proceedings in replevin, subsequent to the declaration and confession of judgment.
3. Of incompetency in the present plaintiff to sustain the action, he having been no party to the replevin suit, and the judgment in his favor being, therefore, a nullity, and the assignment of the replevin bond to him illegal.

The motion for a nonsuit was overruled by the Court, and the case went to the jury. The Court declined to charge the jury, whether the original distress was lawful or unlawful. The jury found for the plaintiff, the amount sued for, with interests and costs.

A motion was made before the Court of Appeals at *Charleston for a *nonsuit* or *in arrest of judgment*, on the grounds taken at the trial, and for *a new trial*, on the additional grounds: [*198

1. That his Honor, it is respectfully submitted, should have charged the jury, that the original distress, in this case, was unlawful, having been made by one to whom no rent was due, and who had no power to appoint a bailiff to make the distress.
2. That the verdict was contrary to law and evidence.

Yeadon, for the motion, said—Can an agent of a landlord appoint a bailiff to distrain?

If this action had been commenced against Clayton, the waiver of error in the confession of judgment on the declaration might have been sustained; but this action is against the surety, and must fall.

When the surety entered into the bond, he entered into an obligation to prosecute his suit to effect, &c.

On the 1st ground. The declaration was not supported by the proof. Can a party not allowed to sue come in and enter up judgment and execution? Could Harris take an assignment of the replevin bond? Can a sheriff assign a replevin bond to a stranger to the record?

The avowant is the only person to whom the bond can be assigned.

Petigru, contra, contended that there was no irregularity, but if there was, it could not avail the surety in this action.

It must be taken that Harris was the landlord, and, consequently, had the right to appoint an agent to act for him.

The agent, then, having the right to distrain, by authority from the landlord, could appoint a bailiff to act for him.

The irregularity complained of is the difference between the affidavit and the warrant of distress.

If one acts for another, and his acts are afterwards confirmed by the person, it is a good authority; cited *Thomas* vs. *Yates*, 1 McM. 179.

Whenever a party may recover against the agent, he may also recover against the principal, cited 2 McC. 164, *Talvande* vs. *Crips*. Replevin only lies in case of a taking for rent. It is not concurrent with trespass or any other action. Clayton, by confessing judgment, has waived all right to complain. [*199

Harris is the real avowant, and the party cannot prevent him from coming in.

The sheriff had the right to assign his bond, as he did.

Yeadon, in reply, said he represented the surety in this case, and not Clayton.

He denied that Clayton had forfeited his bond, and, consequently, that the surety is not liable. If the bond has not been forfeited, how can the party recover

to whom the bond was assigned? The case of *Talvande* vs. *Crips*, cited by the opposite counsel, was not a case in point. Mr. Yeadon pointed out the difference between this and the case cited; referred to the case of *Steadman* vs. *Givens & Nathans*, MSS. (Infra, 202.)

Curia, per BUTLER, J. It must be conceded in this case, that the only parties that were liable to be sued in replevin, after the proceedings in distress had been commenced, were Lesesne and Buckheister. The one assumed the position of landlord, and by warrant under his own seal, constituted the other his bailiff. Harris may or may not have authorized the distress warrant to be issued, or might or might not have adopted the acts of the parties under it This is not, however, conclusive of the question in the case. After the action of replevin had been commenced, the rights and relation of the parties underwent material changes; Harris, the true landlord, came in and adopted and confirmed all the acts of his representative and agents. It might not have been in the power of Lesesne to avow for rent due his principal, as he did not perform the office of the actual bailiff. As against Lesesne, the tenant Clayton might have been able to maintain his right to the property replevied—no rent being due to Lesesne himself, and he not having any of the rights of the actual landlord. But where the distress has been made for rent due the landlord, it is in his power to come in and sanction the distress, and thereby to enable the bailiff to justify the taking, for rent in arrear, in the name of the landlord. The case of **Steadman* vs. *Givins & Nathans*, decided in 1834, was in some particulars like the one under consideration. Givins, acting as the agent of Mrs. Wigfall, appointed Nathans his bailiff, to execute a distress warrant for rent alleged to be due Mrs. Wigfall. It was held, that Givins had no right to issue such a warrant in his own name—nor could he avow for rent due to another. But Judge Harper, who delivered the judgment of the Appeal Court, confirming the Circuit decision made by himself, concludes thus: "Subsequent assent amounts to authority, (Saund. 347, n. 4.) If Givins had any actual share in making the distress, and they had authority from Mrs. Wigfall, or she was willing to adopt their act, both should have justified as bailiffs. Or perhaps, if Givins was not actually present at the taking of the distress, but had authority from Mrs. Wigfall to employ Nathans as bailiff, he might have pleaded *non cepit*. In that case, the authority of Nathans would have been direct from Mrs. Wigfall; he should have justified as her bailiff, while Givins being merely regarded as the medium through which the authority was conveyed, would not have been considered as a party to the taking." In this case, it cannot be doubted that Mr. Lesesne had full authority from Harris to collect the rent, and to employ all necessary and legal means to effect the end. The bailiff, Buckheister, was accordingly employed to make the distress, for his act was adopted by the subsequent assent of the landlord. All the acts that had been done, were under a derivative authority from Harris. He was the party interested; and was it not competent for him to assume his position on the record, as the rightful avowant? The tenant's own acknowledgment of his landlord's right to the property distrained, as established by the confession of judgment, precluded him from making any objection to the regularity and propriety of the proceeding. The great object of the action of replevin is to settle the controversy about rent;

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with this view, the landlord's rights should always be regarded; in such cases there can be no valid objection, why he should not take the place of his mere representative and bailiff.

In the case of *Talvande* and *Cripps*, 2 McCord, 165, Judge Nott remarks, after speaking of the nature of the action of replevin, "The procedings, *therefore, ought to be so modelled as to preserve the relative rights of the parties. The plaintiff has a right to [*201 make the landlord, (or the party destraining) a party to the action, as well as the officer executing the warrant. So, on the other hand, the landlord may come in and be made a party, and defend his bailiff against the action; in the same manner as a landlord may come in and be substituted in the place of his tenant, in an action of trespass to try title." This view of the law in that case was carried out, by allowing the heirs to come in and maintain the avowry that had been put in by the original party on the record, after his death. The distress had been made by an administrator, the goods destrained by him were replevied by the tenant; but the action was not allowed to abate by the death of the avowant: but those who claimed under him were allowed to establish their right to the rent. The bond was no doubt given by the plaintiff with security, to return the goods again, if he should fail to establish the wrongful taking. That bond must always inure to the benefit of the true party in interest; and where he is regularly let in on the record, he has all the rights of the original avowant; and when he cannot have his goods returned by a *retorno habendo*, he is entitled to have the bond assigned to him to go against the surety; for without such bond he would never have been deprived of the benefit of the distress. It is true, that but few of the British statutes(*a*) on the subject of replevin, have been made of force in this State, by express enactment, but they have been adopted in practice; and under this practice, replevin bonds are assignable to the avowant on the record.(*b*) When the writ of execution fails to give indemnity for the injury which the landlord has sustained by the replevin of the goods, the surety to such a bond subjects himself to all the liabilities of his principal; and when the principal fails to return the goods detained, and *nulla bona*, returned on the *fi. fa.*, the surety is then to become answerable. He must abide the acts and become liable by the default of the principal. At any rate, he cannot make a better defence than the principal could have made; nor take exceptions which the principal could not have taken. At no part of the proceedings in this case, *could the present defendant have interfered to exone- [*202 rate Clayton from liability to pay rent to the plaintiff; and why should he now be permitted to relieve himself from liability?

We concur in the circuit decisions, and dismiss the motion.

RICHARDSON, O'NEALL and EVANS, JJ., concurred.

(*a*) See 1 Sp. 286; 2 Rich. 402.
(*b*) 1 McC. 300; Act of 1839, 11 Stat. 36, § 55. *An.*

IN THE COURT OF 3.

GIVENS & NATHANS *ads.* T. STEEDMAN.

Before BUTLER, J., at Charleston, February Term, 1834.

The following is the report of the presiding Judge.

The facts of this case are these: A warrant of distress was levied on the goods and chattels of the plaintiff, signed by Givens, agent of Sarah Wigfall. But the warrant recites that it was issued for rent due by plaintiff to defendant, Givens, as his landlord. Upon reading the warrant, it would appear, that the relation of landlord and tenant existed between Givens and Steedman. It is true, Givens signs himself, *agent of Sarah Wigfall*, but that does not make him so.

In this avowry, Givens endeavors to protect himself, for the distress made under his authority, by alleging that rent was due one Sarah Wigfall. If he issued his warrant upon his personal responsibility, as I think he did, he cannot protect himself by avowing that rent was due to another. At any rate, he cannot do so without showing his authority, either to enter or to authorize a bailiff. No such authority is shown or averred. He commenced the proceedings on his own responsibility, and ought not to protect himself, by avowing that another person was entitled to the rent. One may make himself the tenant of the agent of another, and in that case, the agent could destrain, because the relation of landlord and tenant, would exist between them. The tenant ought not to claim against the terms of the demise under which he holds the premises. He may be tenant to another by a steward, but he consents to it.

I doubt whether the landlord can delegate his authority, to enter and destrain, except to a bailiff, duly authorized for the purpose. Can a landlord delegate to an agent, the authority to make a bailiff? If he can, the authority of the agent should be of as high a character as that required for the bailiff. And when such agent avows for rent, he should show his authority.

A tenant may be willing to subject himself to a landlord, from whom he leases, but not to an agent with whom he is not acquainted, and who might exercise his delegated authority capriciously. The remedy by distress is summary, and ought to be watched with jealousy; at least it should not be unnecessarily extended.

It is a rule of law, that rent must be reserved to him from whom the land proceeded, or to his lawful representative, and cannot be reserved to a stranger, Kent Com. 3 vol. 370. The relation of landlord and tenant is somewhat personal, and none but those who own the land shall have rent reserved or have the power to collect it by distress. The landlord may enter himself or by
*203] his agent, but it should be an agent expressly *with authority to enter. In this case, Givens did not enter, but authorized a bailiff to enter, without even showing authority.

The demurrer was sustained.

GROUNDS OF APPEAL.

1. That the landlord has the power to appoint an agent to sign a distress warrant, and create a bailiff to distrain.
2. That the agency of John Givens was sufficiently averred on the record.
3. That the plaintiff by the pleadings recognized and admitted the agency.
4. That the power vested in Givens as agent was legally executed. If not, the

plaintiff could not take exception to it, nor could the Court know it, as nothing in relation to the mode of execution appeared by the pleadings.

5. That the avowry need not be by the landlord, but may be by an agent.

6. That the decision sustaining the demurrer is, in other respects, contrary to law.

Thos. S. and *H. Grimke*, for the motion.

Yeadon, contra.

Curia, per HARPER, J. We think the avowry defective, and the motion must be refused It is said, that the terms, "making cognizance" or "well acknowledges," imports a justification in the right of another. 2 Chit. Pl. 557, N. C. "Avow" in like manner, imports a justifying in one's own right; and in the same place we are told, that if one avows and the other acknowledges, without saying, as bailiff to the first, it will be error. The defendant, Givens, avows the taking, thus importing a justification in his own right, and shows the rent due to Mrs. Wigfall; and Nathans acknowledges, as bailiff of Givens, whom the avowry shows not to have been the landlord. Any agent to make a distress, is termed a bailiff. "If a man take cattle for services due to the lord, if the lord afterwards agree to the taking, he shall be adjudged his bailiff, though he was not his bailiff in any place before." 1 Bac Ab. Tit. Bailiff, 6. Subsequent assent amounts to authority. 1 Saun. 347, n. 4. If Givens had any actual share in making the distress, and they had authority from Mrs. Wigfall, or she was willing to adopt their act, both should have justified as bailiffs. Or perhaps, if Givens was not actually present at the taking of the distress, but had authority from Mrs. Wigfall to employ Nathans as bailiff, he might have pleaded *non cepit* In that case, the authority of Nathans would have been direct from Mrs. Wigfall, and he should have justified as her bailiff; while Givens, being merely regarded as the medium through which the authority was conveyed, could not have been considered as a party to the taking.

The motion is dismissed.

JOHNSON, concurred.

IN THE COURT OF ERRORS.

*204] *THE STATE OF SOUTH CAROLINA *vs.* E. WATERMAN, ET AL., sureties of J. L. E. Easterling, late Sheriff of Georgetown District.

These were actions of debt on the official bond of Easterling, deceased, late Sheriff of Georgetown district. The writs were issued to Spring Term, 1836, and the actions were prosecuted for the benefit of one Taylor, of New York. On the 20th April, 1836, after the commencement of these suits, C. & C., who were judgment creditors of Easterling, filed a bill in the Court of Equity for George town district against his executor for an account. On the 27th of the same month, the Court made an order for the creditors to file statements of their claims on oath, by the 1st January, 1837, with the Commissioner; and another order, enjoining them from proceeding at law against the executor. The time for filing claims was afterwards extended to January, 1838. In January, 1838, the Commissioner made a report of claims which had been filed in his office against Easterling, in his official capacity only; and the Court thereupon made a decree that the sureties pay the amount of said claims to the Commissioner, and that execution issue against them accordingly; and further, that the creditors of the sheriff who had failed to file their claims, be perpetually enjoined from pursuing the same against the sureties. Taylor's claim was not filed in the Commissioner's office, and, at Fall Term, 1838, these cases, which had been on the writs of inquiry docket since Fall Term, 1836, were struck off. Notice was afterwards given to the defendants that a motion would be made to restore them; and at Spring Term, 1839, such a motion was made, and affidavits offered on both sides. After hearing counsel, the Court made an order to restore them to the docket. The defendants gave notice of an appeal from this order, but did not prosecute it. On the call of these cases for trial, at Spring Term, 1840, the defendants again moved to strike them from the docket, and his honor, Judge EVANS, presiding, granted the motion, *Held*, that it was an improper order in the Court below, and the cases were ordered to be restored to the docket.

Before EVANS, J., at Georgetown, Spring Term, 1840.

The above abstract presents the facts of this case, as they existed at the time the order was made by his Honor, and the following are the grounds upon which the appeal was carried up, and which were argued in this Court.

GROUNDS OF APPEAL.

1. Because the decree of the Court of Equity, in the case of C. & C. against the executor of Easterling, cannot have any further effect than to exonerate the executor. The sureties of Easterling, as sheriff, are certainly liable for all claims against the sheriff, whether filed and proved agreeably to the order of the Court, or not, so long as the amount paid by them and distributed under said decree, is not equal to the penalty of their bond.

*205] *2. Because the injunction, ordered by the Court of Equity, cannot effect Taylor's rights, as he was never a party to the proceedings in the Court of Equity; neither were the sureties of Easterling.

3. The creditors of the sheriff cannot be restricted to a shorter period for bringing suits against the sheriff's sureties, on their bond, than that established by the law of the land.

4. Because the motion to strike the cases from the docket again, was irregular, and ought not to have been entertained.

Curia, per WARDLAW, J. These cases were struck from the docket, either because it was supposed the injunction, ordered in Equity, prevented the Court of law from proceeding, or because, under the view which was taken of the equity proceedings, all further attempts by the plaintiff at law, were considered hopeless. But it does not appear to this Court that the Court below should have interfered to prevent the plaintiff from proceeding, if he would.

An injunction restrains those upon whom it is properly served, according to the order and practice of the Court of Equity; for breach of it, remedy may be had in the Court from which it issues; but it is not served upon a Court of law; and although a Court of law, regulating its own practice, will sometimes, in reference to advantages which, by reason of an injunction procured by himself, a defendant at law might also obtain from lapse of time, notice the fact that proceedings have been suspended by injunction, yet it will not undertake to prescribe or enforce the duty of its plaintiff served with an injunction, but taking care that no surprise be operated, or unfair advantage gained, will leave him to determine his course, at his own peril.

Whether there was an injunction, whether it had been served upon the plaintiff, whether it restrained proceedings against the sureties, who were bound by it, are all questions for the Court of equity, which the Court of law was not properly called on to decide, and had not the means of determining The plaintiff, if advised to pursue his *rights further, [*206
must for himself choose between proceeding at law, and going into equity, to prove his demand upon the foot of the decree rendered there.

The Court has been pressed to lay down general rules upon the subject of creditors' bills, but being well content with the course of decision hitherto had on that subject, and perceiving that, to the reasons upon which the jurisdiction and beneficial interference of equity in the administration of complicated and insolvent estates are elsewhere rested, may here be added the disturbance of legal priorities, which necessarily results from the sale by a sheriff, under execution, of the lands of a deceased insolvent, the Court declines to do more than decide the questions presented at the threshold of the case in hand.

The motion is granted, and the cases restored to the docket.

RICHARDSON, O'NEALL, EVANS and BUTLER, JJ., and JOHNSON, HARPER, JOHNSTON and DUNKIN, Chancellors, concurred.

Petigru and *Lesesne*, for the motion. *Hunt*, contra.

See Riley's Ch. Ca. 192. *An.*

*207] THE TREASURERS *vs.* STILES RIVERS ET AL., SURETIES OF WILLIAM OSWALD, LATE SHERIFF.

In an action of debt on a sheriff's bond, where the defendants pleaded performance, "and the breach assigned by the plaintiff was, that it was the duty of the sheriff to collect and pay over all tax executions which might be lodged, and that on the first day of June, 1835, there were tax executions to the amount of $1,739 78 lodged in his office, and that he did not collect and pay them over." To the plea of performance, there was a replication by the plaintiff, and the defendants demurred specially for the cause that the tax executions making the aggregate were not specified. The demurrer was sustained, and the Appeal Court refused to reverse the decision.

Before O'NEALL, J., at Colleton, Spring Term, 1841.

These were actions of debt on the official bond of Wm. Oswald, the late sheriff of Colleton district, during his term, commencing in 1825. The defendants pleaded performance, and the breach assigned, was, that it was his duty to collect and pay over all tax executions which might be lodged, and that on the first of June, 1825, there were tax executions to the amount of $1739 78, lodged in his office, and that he did not collect and pay them over. The defendants demurred specially, for the cause, that the tax executions, making the said aggregate, are not specified.

The Act of 1801, (Acts of 1801, p. 426,) directs that "the tax collectors shall take the sheriff's receipt for such executions for taxes as they may have lodged with him; which receipt they shall produce in settlement with the treasurer; and it shall be the duty of the Treasurer to transmit without delay, to the Comptroller, certified copies of all such receipts, to the end that he may be enabled to inspect the conduct of the sheriff thereon." The Act of 1813, (Acts of 1813, p. 21,) provides, that the sheriffs, within ninety days after the lodgment of tax executions, "shall make to the Comptroller a full and complete return thereof;" and failing to do so, the Comptroller is directed to "cause him to be debited in the books of the Treasury, with the full amount of his receipts;" and the Act declares, that he shall not afterwards be entitled to any credit for executions by him afterwards returned "*nulla bona*," or "*non est inventus.*"

*208] *It was under this last Act, that the Solicitor undertook to support his replication. The Court ruled, that it derived no aid from it. If his replication had set out, that the sheriff stood debited on the books of the treasury to the amount of $1739 78, for tax executions lodged, and not returned, as by his receipt of the first June, 1825, and that he had failed to pay this sum, then it might have been a breach well assigned under the Act. But as the replication now stands, it charges the lodgment of sundry tax executions to the amount of $1739 78, and that they were not collected and paid over. This breach, it will be observed, does not complain that they were not returned within ninety days after lodgment, but proceeds on the general liability of the sheriff for not collecting and paying over. The object of pleading, is to narrow the grounds between the parties in its several stages, and to reduce general charges to more definiteness and precision, as the parties con-

tinue to plead, so that the defendants may know the very matter with which the plaintiff proposes to charge them. The replication here leaves everything uncertain. The demurrer was sustained. The plaintiffs appeal, on the ground that the decision was contrary to law.

Curia, per O'NEALL, J. This Court concurs in the judgment below. It is plain that the breach assigned, does not make the sheriff liable for the tax executions lodged. For it is not his duty to collect and pay over in all cases; it is his duty to collect, if he can, and when collected, to pay over—but if he cannot collect, it is his duty to return "*nulla bona*," or "*non est inventus;*" and if he so does his duty, he is discharged. For anything which appears on the face of the replication, the sheriff may have, within proper time, returned every execution lodged with him, "*nulla bona*," or "*non est inventus.*"

Independent, however, of this, I think when the plaintiff's cause of action embraces many items or subjects of the same kind, and to each of them, if particularized, the defendant may have a defence, of which he could not avail himself, by a general answer to the replication, then it ought to set out the particulars. This, I think, *distinguishes this case from the rule so well and correctly stated in 2 Saunders, 411, note 4. [*209

Here the defendant's principal may have paid over some of the executions—some he may have returned "*nulla bona*," some he may have returned "*non est inventus.*" Here are three distinct defences, which could not come in under a general traverse of the replication. Hence the necessity for more particularity, and a clear assignment of the particulars in which the sheriff failed to do his duty.

The motion is dismissed.

RICHARDSON, EVANS, BUTLER, and WARDLAW, JJ., concurred.

Edwards, for the motion. *Rhett*, contra.

See Supra, 146. *An.*

JOHN DOWLING, ET AL., *ads.* JOHN HODGE.

Where proceedings were instituted in the Court of Ordinary, for partition and sale of real estate, and the citation or summons issued by the Ordinary, with the probate of service and return, never has been recorded or returned to the Ordinary's office, parol evidence is admissible to prove its existence, &c., in an action of trespass *quare clausum fregit.*

Before RICHARDSON, J., at Gillisonville, Fall Term, 1841.

The subjoined report of his Honor, with the grounds of appeal, furnishes the history of this case and the points in issue between the parties.

This was an action of trespass to try title to a tract of land, marked C., on the plat adduced.

The plaintiff showed a grant to Theophilus Barnes, October, 1793, for four hundred acres, who was in possession forty *years. In 1818, he divided the tract into four parts, "A. B. C. and D." He [*210

gave A. B. and D. to his children, and retained C. After the death of Theophilus Barnes, proceedings were had before the Ordinary; the land (C.) was sold and purchased by John Hodges, the plaintiff; sheriff's title to him 3d August, 1839. The tract C., was located and the trespass proved.

The defendant's counsel made objections to the regularity of the proceedings before the Ordinary; which were all overruled.

The defendant also set up title by possession, and proved a very long possession. But I considered it plainly permissive, and not adverse to the plaintiff's title. And accordingly I charged the jury that the title of the plaintiff was plain and legal; that none of the supposed irregularities in the proceedings before the Ordinary, could invalidate the sale made by the sheriff to him.

That the long possession proved by the defendant, appeared to me to have been by the permission of the grantee; and if so, it could not give the defendant title by possession. But the jury were the final judges, whether such possession had been permissive or adverse.

The jury found for the plaintiff, and the defendant appeals on the fifteen grounds annexed.

These grounds require a narration of nearly the entire evidence, as noted from the proceedings before the Ordinary, and also of the manner of the defendant's possession of the land. The evidence is as follows:

EVIDENCE.

1st. Grant to Theophilus Barnes for four hundred acres, October, 1793.

2d. *Thomas Manker.* Grantee was in possession thirty or forty years. In 1818 he had the land divided into four parts, A., B., C., and D.—C. he retained, and gave the rest to his children.

3d. Proceedings in the Court of Ordinary to divide, &c.

First, citation (but service does not appear.) Second, order to sell, April, 1838. (These are from the Ordinary's record book; originals not produced.)

4th. Title of sheriff to John Hodge, 3d August, 1839.

*211] * *W. M. Hogarth.* Saw the citation, and witness took the oath of W. Mulligan that he served the citation on John Dowling and wife.

R. G. Norton, Ordinary. Has searched and cannot find the original citation or summons; he finds the petition.

Thos. Manker. Has seen the original citation in hands of Mulligan, and his affidavit of service. (The competency of this evidence and Hogarth's, objected to.) Grantee sold A.—B. was given to a son, and D. to James Dowling, son of defendant; B. was the eastern, and D. the western boundary of C.

Cross-examined. Witness was present when the Ordinary gave the order of sale to the sheriff, and Dowling objected.

Dowling had part of the land in cultivation, and had permission to cultivate it. Dowling had it in cultivation for fifteen, certainly ten years.

W. M. Hogarth. Knows the land, &c., has seen James, John, and Madison Dowling at work on it. Hodge forbid their working on it; said if Hodge bothered him he would split his head with his axe.

DEFENCE—POSSESSION.

John Barnes. John Dowling has lived where he does now twenty-five or twenty-six years; he has claimed C. by permission of grantee up to this time. Grantee told Dowling to cut timber, clear it, and keep it till he called for it.

Cross-examined. Defendant lived on James Dowling's part, and cultivated C., three or four acres; C. belonged to Barnes, the grantee; it was called his, and defendant had permission to keep it till he called for it.

Olive Barnes, daughter of grantee. Defendant did not claim C. as his own, but

had permission of her father to cut and use it. It always passed for his; her father lived on the land where Hogarth lives.

NOTE.—Defendant, John Dowling, married grantee's daughter; James and Madison Dowling are grantee's grand-children.

GROUNDS OF APPEAL.

1st. Because his Honor permitted the plaintiff to introduce *in evidence proceedings in partition before the Ordinary, without a summons regularly returned as served. [*212

2d. Because his Honor ruled that these proceedings were a good record, when the foundation, namely, the "summons" or "citation," was wanting.

3d. Because it being proved the original papers were not to be found in the Ordinary's office, his Honor permitted the plaintiff to go into secondary evidence, without his having proved their loss or destruction.

4th. Because the next highest evidence to the orignals, is the Ordinary's record book, and the Court should have admitted no evidence beyond it.

5th. Because the Court permitted the plaintiff to go into parol testimony of the existence and service of the summons or citation.

6th Because his Honor permitted the plaintiff to prove by a witness, that he had heard the man who served the summons say he served it, when there was no evidence that the person serving it was out of the reach of the process of *subpœna*.

7th. Because his Honor ruled that the Ordinary's proceedings was collateral, whereas they constitute a distinct link in the plaintiff's chain of title.

8th. Because his Honor charged that the judgment of the Court of Ordinary could not be controverted.

9th. Because his Honor charged that the proceedings appeared to be regular, and the defendant was bound to show they were irregular; whereas they were irregular on their face.

10th. Because it was proved that the defendant objected to the sale and proceedings in partition before the Ordinary, and the Ordinary recites that "no objection was made," which in itself proves an irregularity.

11th. Because his Honor charged the jury that this case differed from Sumner and Murphy, (2 Hill 498)—so as not to be governed by it.

12th. Because the defendant made out a clear case of statutory possession, whereas his Honor charged the jury that he had failed to do so.

13th. Because it was proved that the defendant, John Dowling, went into possession under these words from his *father-in-law: "take the land, use it and clear it, plant it, and keep it until I call for it." That he never called for it, and died without doing so. That twenty-two years elapsed between John Dowling's going into possession on this permission, and the bringing of this suit, which established a presumption of a gift [*213

14th. Because as against James T. Dowling and Madison Dowling, this was strictly an action trespass *quare clausum fregit*, and it was absolutely necessary to prove entry and possession to maintain an action; and the plaintiffs failed so to do.

15th. Because the verdict was, in other respects, contrary to law and evidence.

W. F. Hutson, for the motion. The proceedings before the Ordinary are a distinct link in plaintiff's title. The citation not being produced, it is not a record. *Miller* vs. *Alexander*, 1 Hill Ch., 27; *Ordinary* vs. *Condy*, 2 Hill, 313. The sentence or decree of the spiritual Court is not conclusive; all the proceedings must be produced. 1 Esp., 5; Duchess of Kingston's case, 1 Leach's C. C., 146; 1 East. P. C., 468. The citation being absent, no secondary evidence could be adduced, unless its actual loss or destruction was proved.

The next highest evidence was the Ordinary's record book; and as that did not show service of the citation, nothing beyond could be admitted.

If the Ordinary's book had been destroyed, the next highest evidence was the person who served the citation. Yet the Judge permitted the magistrate who

swore him to the service, to testify that he had done so. This was, however, a clear case for the Court to presume a grant or title from Barnes to defendant. See *Sumner and Murphy*, 2 Hill, 488, and the circumstances of this case, as presented in the report. No entry and possession was proved in plaintiff; and this is necessary to support T. Q. C. F. 3 McC., 422; 1 Bail., 306; 2 Hill, 466.

W. E. Martin, contra. The decision of the Ordinary, and the regularity of the proceedings on which it is based, cannot be inquired into in this collateral manner. *214] McMullan,* 85; 1 Bailey, 25. If, however, the want of service was an objection to the strength of plaintiff's title, that service was fully proved by the magistrate, before whom service of the summons was sworn to, viz.: William Hogarth.

Curia, per RICHARDSON, J. The mere facts of the case have been well disposed of by the verdict. The plaintiff had unquestionable titles from the grantee down to himself, to justify the finding. The objections are to the introduction of the Ordinary's record book to justify the order for the sale of the grantee's land, which the plaintiff purchased from the sheriff. The only original paper wanting, was the Ordinary's citation, and the return of the service, so as to bring the case legally before the Ordinary for judgment in partition. All the original proceedings after citation, were recorded in the record book.

To justify the evidence of the citation, as set out in the record book, the Ordinary swore he had searched for and could not find the original citation, but found the petition for the partition of the land. But the service or return of the citation was not set forth in the Ordinary's record book. To supply this, as the citation and return on it were not to be found, Hogarth was allowed to prove that he had seen the citation in the hands of Wm. Mulligan, and that he made probate of the service before the witness; not that he had merely heard Mulligan say so. Thomas Manker swore he had also seen the citation in the hands of Mulligan, with his affidavit in the probate annexed; not that he had merely heard him say he had served it: and also, that John Dowling was present when the Ordinary gave the order of sale to the sheriff; and when Dowling objected, but not for want of citation; he claimed the land. Upon this secondary evidence, the Court held both the citation and the service legally proved; and that the Ordinary's record book proved the subsequent proceedings before him; the book being itself the original record of such proceedings.

This cannot be questioned. It is equally clear that the citation and probate of service having been lost, the evidence that they once existed, was very competent to supply the loss. The Court can lay down no *215] imperative* rule for the introduction of such secondary evidence. All secondary evidence is of itself a departure from the strict rules, from necessity, and must depend upon the infinite variety in the position of cases, where the best evidence has been lost. But the suppletory proof of this case is full and satisfactory.

The motion is, therefore, dismissed.

EVANS and BUTLER, J.J., concurred.

Penelope Avant *vs.* J. H. Robertson.

1. Widow's claim of dower extends to all the lands of which her husband was seized during coverture; and the alienation of the husband, during his life, is an immaterial circumstance, as to her right of dower. The very definition of dower, of course, embraces the whole right, whether in lands aliened, or in those of which the husband died possessed.
2. The acceptance of the provisions under the statute, by a widow, is a legal bar to her rights of dower; and such acceptance may be pleaded at law, as a defence to the demand of dower.
3. Where a widow is found purchasing part of the real estate of her deceased husband, joining with the other heirs at law in the title deeds for other portions of the land, and receiving part of the money for which the land was sold, these are such circumstances as go to show her election and acceptance of the statutory provision of dower; and where the question of election has been fairly submitted (under the circumstances) to the jury, and they have decided, the Court will not disturb their finding.

Before Earle, J., at Horry, Fall Term, 1841.

This was an action by the demandant to recover dower in the lands of her deceased husband. Plea, that the demandant had joined the other heirs at law of her husband, in making partition of the estate, and had elected to receive her distributive share thereof, under the statute of distributions; to which there was a general demurrer, and *joinder [*216 in demurrer. After argument, the demurrer was overruled, and the plea held good. The plaintiff then put in a replication, denying the fact stated in the plea, upon which issue was joined, and the case went to the jury on the following proof.

The lands of the estate were advertised by Henry Avant, as the agent of the heirs at law, to be sold at auction, for distribution among them; and were sold. The heirs were all of age. The defendant bought one tract of two hundred and seventy-eight acres, and produced a deed, in which the plaintiff and other heirs joined, in consideration of three hundred dollars paid. Mr. Beaty, who drew the deed, was likewise present at its execution, and the money was directed (the plaintiff being present) to be paid to Henry Avant, the agent for them. Another tract advertised and sold in the same way, was purchased by James Lambert, for nine hundred and sixty-one dollars. He paid the money to the heirs collectively, (the plaintiff being present) and procured their joint deed of conveyance. These two tracts composed the bulk of the estate; another tract, whereon the plaintiff lives, was purchased by herself; and of the proceeds of the sale to Lambert, the plaintiff did receive her proportion. There was some inconsiderable personal estate, which did not appear to have been accounted for by the administrator, or to have been distributed. Verdict for the defendant, which the plaintiff moved to set aside.

GROUNDS OF APPEAL.

Because the receipt and acceptance of a distributive share, under the Act of 1791, does not bar the claim of dower to land in possession of and aliened by the husband, during coverture.

And for a new trial, on the following grounds, viz:

1. Because there was no evidence that the personal estate of demandant's husband had ever been distributed, or that she received any part of the same, or a sum of money in lieu thereof.

2. Because there was no proof of an acceptance under the Act of 1791, by the demandant, or that she ever made her election according to the said Act. And if the defence can avail the defendant at all, he should have proved that
*217] *the demandant received her full distributive share under the Act, or had accepted a smaller sum, in lieu of said share.

3. Because the fact of demandant's joining in the conveyance of lands of the intestate, is not evidence of such an election, under the Act, as will bar her claim of dower.

Curia, per WARDLAW, J. The statute of distributions passed 1791,(*a*) provides "that in all cases where provision is made by this Act, for the widow of the person dying intestate, the same shall, if accepted, be considered as in lieu of and in bar of dower." And the questions here presented for the consideration of the Court are,

1. Does this statutory bar of dower extend to all the lands whereof the widow might have claimed dower, whether alienedby the husband, during coverture or not, or is it confined to those lands whereof the husband died seized, and of which, by the statute, the widow may take a share, as one of the heirs?

2. Is the acceptance of the provision under the statute, a bar of dower at law, or only in equity?

3. Is distinct manifestation of election made equivalent to acceptance?

1. The very definition of dower shows that the wife entitled to it shall have the third part of *all* the lands and tenements whereof the husband was seized at any time during the coverture, to hold to herself for the term of her natural life. The alienation of the husband is an immaterial circumstance, as to the right of dower, and a general mention of dower, of course, embraces the whole right, whether in lands aliened, or in those of which the husband continued seized. The fourth essential requisite of a jointure, laid down by Lord Coke, (Co. Lit., 36 b,) is, "it must be made in satisfaction of her whole dower, and not of part of her dower," which, he says, "is so plain, it needeth not any example." Therefore, a conveyance, in *part* of jointure, was declared no bar to dower, from the uncertainty of its expression, and the impracticability of its application, (4 Rep., 3;) but the expression, "in lieu and bar of dower," has always been held to satisfy the requisite, and is the usual and approved expression
*218] in all jointures. *That the Legislature intended that the widow should be barred of dower in all lands whereof she might have been endowed, may be inferred, not only from the general and unqualified expression, "in lieu of and in bar of dower," but from consideration of the inconvenience and irregularity which would result, if the widow, after taking, as heir and distributee, a share of the whole estate, real and personal, of her deceased husband, should be permitted, by claim of dower in the lands alienated by the husband, to subject the heirs, herself in the number, to the possible consequences of an action on the husband's warranty, for redress of the injury done by her claim to the alienee.(*b*) The Court is of opinion, that the statute plainly meant to create an election to be made by the widow, between her dower at common law, and the provision made for her by the statute.

2. The statutory bar in question, is at least as strong as any that could

(*a*) 5 Stat. 162.
(*b*) *Braxton* vs. *Freeman*, 6 Rich. 36. 10 Rich. 158.

be created by a devise expressed to be in lieu and bar of dower; and the acceptance of such devise may be pleaded at law as a defence to the demand of dower. Chancellor Harper, in the case of *McDowall* vs. *Black*, 1 Bailey's Eq., 327, says, "the rule seems to be, as laid down by Mr. Hargrove in his note to Co. Lit., 36 b, note 6, that where a devise is expressly in bar or satisfaction of dower, that is a defence at law; but that a Court of equity will sometimes raise a case of election from the special circumstances, when the will is silent" In the case of *Kennedy* vs. *Mills*, 13 Wendell, 553, which only makes more plain what had been before decided in New York, (1 Johns. Rep., 307; 10 John., 30; 7 Cowen, 287,) the widow's election to receive a testamentary provision, given in lieu of dower, was, at law, held to bar her dower. All the cases refer to what was said by Lord Redesdale, in *Burmingham* vs. *Kirwan*, 2 Sch. & Lef., 451, and rest finally upon decisions in 2 Leon., 272, and Cro. Eliz., 128. The Court of law cannot compel the widow's election, nor would it interfere with the indulgence which Courts of equity extend to her, in making it; but when of two things, between which there is plainly a legal necessity for her to choose, her choice has been made of one, the law will deny her claim of the other.(*a*)

*3. The provision made by the statute, seems to be like dower *ad ostium ecclesiæ*, or a jointure settled after marriage, or a devise expressly in lieu of dower, in this, that they all proposed for the acceptance of the widow, something which, if taken, shall be in bar of dower at common law. When shall the provisions be said to be "accepted?" It has been contended here, that it is not accepted until it has been fully paid; that no collateral satisfaction will bar before payment. It is true, that it is not the offer, but the render of satisfaction which bars. Yet, if a yearly provision for the life of a widow, be bequeathed in lieu of dower, shall there be no bar by acceptance whilst she lives? If one of two things is to be enjoyed, any unequivocal act done, with full knowledge of facts and legal rights, with a view to election, determines the choice; and whilst it establishes the title to the one thing, bars the claim of the other. The thing chosen is then accepted The widow who enters upon the lands of her post-nuptial jointure waives her right of dower; and in the case before us, we find the widow buying land, selling land, making conveyances, and receiving money—all acts which, under the circumstances, plainly indicate her acceptance of the statutory provision, but are irreconcileable with the claim of dower. Whether the statutory provision had been accepted, under circumstances manifesting election, was a question which the jury have decided, and this Court is satisfied with the decision. [*219

Motion dismissed.

Richardson, O'Neall, Evans, and Butler, JJ., concurred.

Mr. Hurllee, for the motion. *Mr.* ———, contra.

(*a*) See *Evans* vs. *Pierson*, 9 Rich. 12. *An.*

*220] *WILLIAM NEVE *vs.* THE COLUMBIA INSURANCE COMPANY.

Where a party obtained from two different Insurance Companies, a policy of insurance, for the same stock of goods; and by one policy, (to wit,) the one obtained from the defendants, it was expressly stipulated, "that in case the buildings or goods herein mentioned, have been already, or shall be hereafter insured by any policy issued from this office, or by any agent for this office, or by any other Insurance Company, or by any private insurers, such other insurance must be made known to this office, and mentioned in or endorsed on this policy, *otherwise*, this policy to be void." *Held*, first, that the question, of whether the stock of goods described in this policy was the same as those described and covered by the policy in the Charleston Insurance Company, was a question properly for the jury, and their finding will not be disturbed.

Secondly, It was held, that the policy of Insurance, obtained from the defendants, was void, by the terms of the policy. It having been obtained by fraud and misrepresentation.

Tried before his Honor Judge BUTLER, January Term, 1842, at Charleston, whose reports of the facts are as follows :

This was an action upon a policy of insurance for $2,000, effected by the plaintiff, at the office of Mr. Alexander Robinson, agent for the defendants, on the 1st January, 1840, on "a stock of Groceries, Liquors and Wines, &c., contained in the two story wooden building," &c. The premises were destroyed by fire, on the night of 27th April, 1840, and the next day the claim of the plaintiff was made, in which his whole loss was set down as $6,500, upon his stock in the store. In the policy of insurance is contained a special clause, guarding against a double policy; and the defendants objected to the plaintiff's recovery, upon the ground that this clause had been violated; and secondly, upon the ground, that the plaintiff had fired his own premises. It was admitted in the progress of the trial, that the second ground could not be maintained, so that the case turned entirely upon the first ground.

It was proved, that in May, 1839, one Kohnke was the proprietor of of the stock of groceries, &c., in the same store, and that he sold them to Neve, the plaintiff, upon an agreement that Neve should pay him $1200 in cash, should confess judgment for the balance, and take out a policy of insurance, and assign the same to Kohnke. Neve therefore made an offer for insurance, at the Charleston Insurance and Trust Company, for *221] $2,500 upon the stock, *valued at $3,000, and upon the offer made a written entry that the policy was to be assigned to Kohnke. The policy was effected accordingly, and on the face of it was written by the agent of the Company, "this policy may be assured to C. F. Kohnke." Mr. Moise acted as the attorney of Kohnke, took the confession of judgment for him, and the policy of insurance was delivered to Kohnke's agent, and never, at any time had been in Neve's possession, or was claimed by him. It was considered as assigned to Kohnke, and when produced at the trial, had an assignment endorsed thereon, written however, since the action was commenced. After the fire, Kohnke's agent, Mr. Moise, made a claim for payment of this policy, which was refused, upon the grounds stated in my report of that case.

Mr. Robinson, the agent of the Columbia Insurance Company, proved that Neve applied to him to effect insurance on the stock in November,

1839, that they could not agree as to the rate of premium, and separated. In January, 1840, Neve again applied, and Robinson asked if he had stood his own insurer since they had before conversed. It appeared, that in the offer made in writing to Robinson, and which was in Robinson's handwriting, that the stock was originally set down as worth $6,000, which sum was, however, struck out, and without filling up again that column, $3,000 was set down in the next column, as the amount to be assured, and $2,000 in the column in which was placed the amount actually insured. Mr. Robinson stated, that he went round himself to inspect the stock, and considered it worth about $3,000; that he returned to his office, and that he remembers having asked Neve, whether he had any other insurance upon the property; to which Neve answered in the negative.

On the other hand, a witness for the plaintiff, (Mr. Rose) swore that he was present at the time, having gone with Neve at his request, and that Neve told Robinson of the insurance made for Kohnke's benefit, at the Charleston Insurance and Trust Company. This evidence is in writing, and cannot be referred to.

There was a contrariety of evidence, also as to the value of the stock. Mr. Neufville, who dealt at Neve's store, *thought his stock worth $4,000. Mr. Estill proved, that hearing that Neve wished [*222 to sell, he brought him a purchaser who wished to buy, and both parties being desirous of trading, he presumes that Neve fairly valued his stock, and that he asked for it $4,500. It was also proved by the production of various bills of parcels, that Neve had purchased from January to April, articles costing about $2,200, exclusive of the original stock. The assessment too of the tax collector was produced, assessing the stock as worth $4,000.

On the part of the defendants was produced Neve's claim, swearing the stock to be worth $6,500, and the evidence of several witnesses, who merely testified in general as to the value of stocks, without seeming to know anything of this particular stock.

I charged the jury on the different questions made in the argument, as follows: The main questions upon which the case turned, were these: did Neve procure a double policy to be effected on the same stock of goods? And second, was the last (the one on which the action is brought) obtained by misrepresentation and fraud? Whether the policy under-written by Robinson was void or not, depended altogether on the character of the one effected in the Charleston office, and the legal rights of the parties under it. It purports to be an assurance on goods to which Neve had exclusively a legal title; Kohnke had no legal interest there at all, nor any special lien. His lien, by confession of judgment, was general and even contingent, and I thought this was not an insurable interest, and was not embraced at all in the policy. Indeed, I thought Kohnke held the policy as collateral security only. My judgment on this point underwent some change in the argument of the case against the Charleston Company. The modification of my judgment will be seen by reference to my report in that case. This does not, in any wise, however, affect the result of my decision on the case under consideration. For although Kohnke may have had some interest, it was limited and special, and did not deprive Neve from having a concurrent interest

with him in part, and an exclusive interest as to the other part. This will be apparent from this view. Suppose no other policy had
*223] *been effected, but the one in the Charleston Company. That would have been good against the Company for $2,000; and it would have been good for the benefit of Neve, enabling him to pay a debt of $1,000, and giving him, besides for his own use, $1,000 more; it would have been worth to him $2,000. But concede that Kohnke had an interest by assignment in the policy; and he could not have it without an interest, no policy ever being good, without some interest to be protected; still Neve had an exclusive interest to the amount of $1,000. That was his own insurance to that amount, in which Kohnke had no concern. Was not then the second policy a double insurance on the same stock of goods? I think it was, and so charged the jury.

The other question noticed was one of fact, to wit: Was this second policy procured by misrepresentation and fraud? Mr. Roblnson swore that it was, and gave satisfactory reasons why it was so obtained. The evidence of the other witness (Rose,) would seem to conflict with Robinson's statement. If notice of former insurance had been given to Robinson, it was his duty to have noted it in his policy, which was not done; and I am inclined to think that the omission is evidence that he never received such notice. Be that as it may, it was a question that was submitted to the jury.

Another question was made, but which was also one of fact; that the two policies were on different stocks of goods. The stock insured is described in the same way in both policies. Though some things were sold and others bought, they had reference to the same general stock. The contract of insurance is one of indemnity, for such loss as the assured may suffer by the destruction of goods of a particular description, not for the loss of the particular cask of wine, &c., which might be in the store at the time; and if it were not so, the assured would be generally the sufferer, for within a year he may have sold the specific articles that were in the store at the time the policy was taken.

All the questions of fact were submitted to the jury under my views of the law, as above stated. The most important issue of fact was, whether
*224] Neve had not fired his *own house; upon that issue, much evidence was given, which it is unnecessary to notice here. The jury found a verdict for the defendants, and the plaintiff appealed, on various grounds; all of which are resolved into the question, whether the same stock of goods have been twice assured or not.

Kunhardt, for the motion, said, if Neve had a separable interest in the goods assured, from that assured by the Charleston Insurance Company, this policy may be good; cited 1 J. Cas. 1. Such facts as may increase the risk or premium must be communicated, otherwise not; 17 Wend. 631, is but a continuation of the case of 9 Wend.; 19 Pick, 81. He had the right to insure all, although a part may be assigned and assured elsewhere. The policy to the Columbia Company covers a greater amount of goods, 18 Pick. 523. The assignee might recover all, although a part only was assured for his benefit, 2 Marsh. on Ins. 654. If the second policy were attached, a return of the premium ought to have been made.

H. A. De Saussure, contra, said, the action is upon the contract. The goods are his own, and insured in that policy alone. It declares the consequence of a double assurance; the policy is to be void. No notice of such assurance makes it void. The fact, that two actions have been brought for the same loss, on the two policies,

shows that it is a double assurance. The plaintiff had the legal interest in the goods, when they were assured. He had an interest to pay his judgment to Kohnke and to retain the balance. By the verdict of the jury, he is concluded from examining now the second ground of defence, in relation to misapprehension and fraud. The first ground is irrelevant, because the real issue was, whether the same goods were twice assured; the second and third are also irrelevant. The Judge's illustrative remarks are no grounds for a new trial.

Memminger, in reply, said, what is a double assurance? Cited 3 Kent Com. 280. Two insurances on the same risk *and same interest, 4 Dall. 351; [*225
12 Mass. 214; 1 Marsh. 146, 152. Kohnke clearly had an insurable interest, 1 Camp. 401; 5 B. & P. 299; 1 Ib. 315; 3 Kent, 371. Was the Charleston insurance, an insurance of Kohnke? 6 Cranch, 274; 12 Mass. 80; Phill. on Ins. 41, 64. A mortgagor may insure a ship and not disclose the mortgagee. It is not necessary to disclose the interest, 2 T. R. 188; 2 Cains 13, note; 2 Wash. 152. A party may divide his interest and insure as he can, Hughes, 91, 92. A broker may insure in his own name, and the parties may recover according to their respective interests. The law will make the parties to a double insurance, contribute rateably. Neve did not own the first insurance, when he was insured the second time. As to the assignment, cited 1 H. B. 239; 7 T. R. 347; contracts by specialty and by parol, 1 N. & McC. 249; bonds may be assigned by parol, 19 J. R. 95; choses in action may be assigned by delivery.

The policy cannot be assigned, except in equity. The assignment or delivery operates alike. The plaintiff never had the first assurance. Kohnke never could recover beyond his particular interest, 9 E. 702; Phill. on Ins. The assignee after acceptance, may bring the action in his own name, 8 Mass. Rep. 517; 20 Marsh. 800; 17 Wend. 631, rules that after assignment, the party may insure again, without notice of the first. The risk is not the same. There is a limitation in the Charleston policy, not in the Columbia. The conditions are construed strictly.

Curia, per BUTLER, J. In approaching the questions in this case, many of the difficulties have been removed by the opinion of the Court, in the case of *Neve for Kohnke* vs. *The Charleston Insurance Company.*(*a*) Whether the stock of goods described in this policy, was the same as that described and covered by the Charleston policy, was a question of fact, properly submitted to the jury, and so far from our being dissatisfied with their finding, we think there was sufficient evidence to have warranted it At the time the goods were sold to Neve, they were estimated to be worth not more than $2,200, and it seems probable, at least, that at that time he had no means of his own to increase the stock, and the profits must have been excessive *if by them he subse- [*226
quently increased its value to $4000 or $6000. He himself suffered his stock of goods, at two different times, to be valued at $3000, by taking a policy on them, at each time, for $2000. This question of fact being settled by the verdict, we must assume that two different policies have been taken, on the same stock of goods. And the main question in the case now occurs, was the policy on which this action is brought a double policy, and procured to be made without notice or by a suppression of truth, in relation to the first? Because if so, it is void by the terms of the policy itself, which contains this explicit clause: "In case the buildings or goods herein mentioned, have been already, or shall be hereafter insured by any policy issued from this office, or by any agent for this office, or by any other insurance company, or by any private insurer, such other insurance must be made known to this office, and mentioned in

(*a*) Inf. 237. *An.*

or endorsed on this policy, *otherwise, this policy to be void.*" The Charleston policy is not mentioned in or endorsed on this policy; and I think the evidence was entirely satisfactory, that no notice at all of the former policy was given to the underwriters of this; otherwise, why was there not a memorandum of it? Stript of all the extraneous circumstances, the question resolves itself into this: Was Neve, the plaintiff, bound to give notice of the first policy? In fair dealing and good faith, we think he was. If he had parted with his entire right in the first insurance, by an equitable assignment to Kohnke, he might possibly have felt himself at liberty to take this policy without notice. I am, however, very far from sanctioning such an idea. He had the exclusive title to the goods insured, and does not occupy the position of a mortgager, who had assigned to his mortgagee a policy taken to secure his interest, and who might have been at liberty to take out another policy to secure his own, to wit: an equity of redemption. Such was the case in 7th and 17th Wendell, referred to in another opinion. There are many good objections to the judgments on this point, in the cases referred to, but I am not called on to review or sanction these decisions. They may well stand on their peculiar facts, whilst the question in the case before the
*227] Court would not be affected by them, for it has been shown, that *at no time had Neve parted with his entire interest in the Charleston policy. He placed it in the possession of his judgment creditor, with only an equitable and limited interest in it. Independent of Kohnke's lien on the papers, Neve still could have collected the policy, and realized from it $1000. In fact, it was legally his policy, and honesty required that he should have given notice of its existence, before he procured the one on which this action is brought. In addition to the fact of his giving no notice, as required by the policy, he suppressed the truth in relation to the former one, for he said to Mr. Robinson, that there was no other policy on the stock of goods, and that he had stood his own underwriter. If this be true, (of which I have little doubt,) the plaintiff was guilty of a flagitious fraud, which in fact, made his policies worth more than his goods, and if he could have realized the sums called for by them, it was his interest that his goods should have been destroyed, as they were about three months after the last policy was taken, and about twenty days before the expiration of the first. Courts should sustain insurance companies in discountenancing double policies, as they weaken the inducement of the assured to take care of their property, and thereby jeopard the security and safety of whole cities. Prudence as well as justice, induces us to sanction the verdict of the jury, which has condemned the bad faith of the plaintiff. Insurance companies run risks, which is the source of their profits, but they are entitled to have good faith observed toward them.

The motion is refused.

EVANS and WARDLAW, JJ., concurred.

O'NEALL, J., having an interest in the Company, gave no opinion.

*JANE DEHAY *ads.* FERGUSON & DANGERFIELD. [*228

Where an action is brought by a party, on a bond given under the Trover Act of 1827, "to be answerable for all damages which the defendant may sustain by any illegal conduct, in commencing and conducting the said action of trover," and the party sueing on the said bond recovers, a new trial was ordered, unless the plaintiff would release all the verdict except so much as was rendered for the taxed costs of the former action. *Vide Brown* vs. *Spann*, 3 Hill, 324, and note thereto.

Before EARLE, J., at Charleston, May Term, 1841.

Debt on bond; *pleas, non est factum*, and *non damnificatus*. One Rhame had brought an action of trover against these plaintiffs, for fourteen negroes, valued at $10,000; under the Act of 1827, he made the necessary affidavits, and the plaintiffs were required to give bond. Rhame, on filing his declaration, likewise entered into bond, with the present defendant as his surety, to be answerable, according to the provisions of the Act, for any illegal conduct in sueing out the said writ, or instituting the said action of trover. On the trial, there was a verdict for the defendants in that action, (the present plaintiffs,) and they had judgment and execution for their costs, with a return of *nulla bona*, whereupon they brought suit upon the bond given by Rhame and this defendant, on filing the declaration in trover. The plaintiffs offered no other evidence of illegal conduct in bringing the action, than the affidavit setting up a false claim to negroes not his own, and causing the plaintiffs to give bond in a large amount. They offered the record with the verdict and judgment for the defendants, and claimed for damages the counsel fees paid, and agreed to be paid, and the taxed costs of the action. The presiding Judge thought that the question arose only on the statute, and that making a false affidavit, and commencing a groundless action, as was manifested here by the verdict, did constitute illegal conduct, under the Act, and made the defendant liable in this action. The jury were told that the plaintiffs were entitled to recover the charges of defending themselves from the false claim of the former plaintiff in trover, and that part of a counsel fee agreed to be paid, properly constituted an item of those charges. The jury found for the plaintiffs, accordingly.

*GROUNDS OF APPEAL. [*229

1. That his Honor erred in charging that the verdict for the defendants, in the original action of trover, was sufficient proof of the groundlessness of the action, and the falsity of the affidavit made to support it, and indeed was the test of the "illegal conduct," in commencing and conducting the original suit, which, under the trover Act, entitles the present plaintiffs to damages against the defendant.

2. That his Honor erred in charging that the costs, and the counsel fees also, of the defendants in the original action, and as well the costs and portion of the counsel fees remaining unpaid, as the portion of the latter actually paid, were recoverable in the present action.

3. That the verdict was, in other respects, contrary to law and evidence.

Yeadon, for the motion, cited and referred to *Spann* vs. *Brown*, 3 Hill, 324; Bull. N. P. 11. The Act of 1827 merely subjects the sureties to the liabilities of the principal.

Petigru, contra, said that it was illegal to make a false claim in trover, under the Act of '27. The liability for costs, arises from the illegal conduct of bringing a false action. The counsel fee ought, as a matter of course, to follow. The party is amerced for bringing a false and groundless action.

Curia, per EVANS, J. In the case of *Brown* vs. *Spann*, 3 Hill's Reports, a construction was given by this Court to the trover Act of 1827; and, at the request of the counsel for the plaintiffs, we have heard further argument, and reconsidered that decision. But the re-argument has not changed the opinion expressed in that case, so far as it goes. So much, therefore, of this case, as involves the right of the plaintiffs to recover the counsel fees paid by them in the case of *Rhame* vs. *Ferguson & Dangerfield*, must be governed by the case of *Brown* vs. *Spann*. But the question of costs did not arise in that case, and we are of opinion the plaintiffs may be allowed to retain so much of their verdict as covers the taxed costs in Rhame's case, *without conflicting with the case of *Brown* vs. *Spann*. In that case, it is said, in general, the Courts are open to all who conceive themselves injured, and all may lawfully bring their complaints before the Court for adjudication. The only legal consequence of failure, is the payment of such costs as the law allows. In Buller's *Nisi Prius*, it is said, "it is not actionable to bring an action, though there be no good ground for it, because it is a claim of right, and the plaintiff finds pledges to prosecute, and is amerceable *pro falso clamore*, and is liable for costs.

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It would seem from this, that although a man may bring an action without a legal cause, where there is no malice, without subjecting himself to action for damages; yet it is so far regarded illegal, as to subject him to the payment of costs. The Act of 1827, no doubt, intended to require of the plaintiff the guaranty of a bond, with security, to satisfy any legal liability growing out of the action of trover, as well to secure the payment of damages where, by law, they are recoverable, as the costs where, as in this case, the plaintiff is insolvent and unable to pay. We are therefore, of opinion, a new trial should be had, unless plaintiffs shall release all their verdict, except so much as was rendered for the costs of the former action; and it is so ordered.

RICHARDSON, O'NEALL and BUTLER, JJ., concurred.

WARDLAW and EARLE, absent.

See *Jeter* vs. *Glenn*, 9 Rich. 380.

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*231] *NATHANIEL HEYWARD *vs.* ELIZA SEARSON.

Where a plaintiff, in an action of trespass to try title, has discontinued his suit, he has no right to call upon a Judge to certify his plat, when he is not properly before the Court. The certificate of the Judge, if granted, would be *extra judicial*.

Before RICHARDSON, J., at Gillisonville, Fall Term, 1841.

This was an action of trespass to try title, discontinued by the plaintiff.

The defendant moved that she be permitted to introduce her surveyor, appointed by the Court, and swear him to the fact that he had platted the *locus in quo;* and that the plat produced, represented it; and that the presiding judge should then certify, that the plat was the one made by the defendant's surveyor, under a rule of survey. The motion was refused, and the defendant appeals, and moves to reverse the decision on the annexed grounds.

GROUNDS OF APPEAL.

1. Because the Act of 1744 provides, that if the plaintiff, in an action of ejectment, suffers a nonsuit or discontinuance, he shall be barred, unless he recommence within two years; which Act would be a nullity, unless the *locus in quo* is defined.

2. Because by our practice, the description of the *locus* in the declaration is loose and general, and without a plat, does not exhibit or fix the land in dispute.

3. Because the practice of the Court, is to certify the plat used on the trial, for the reason stated in the second ground, and the reason holds equally good in a case of nonsuit or discontinuance.

Curia, per RICHARDSON, J. Where a trial for land has taken place, and a verdict has been given, the judge certifies the surveyor's plat as a memorial, that that very plat is the one referred to by the jury, as presenting an accurate map of the land adjudged to the plaintiff or the defendant.

But in the case supposed by the motion, the plaintiff having before discontinued his action, was already out of Court, as much so as if the discontinuance had been ordered years before; and no question having been decided, *the Judge could hold no cognizance of the rights [*232
of the parties.

The certificate of the plat would, therefore, have been altogether extra-judicial, and a piece of gratuitous testimony, in a contingent case, which had never been tried, and might never arise.

As to the provisional rights of the defendant, which may arise under the Act of 1744,(*a*) if the plaintiff shall not recommence his action within two years after the present discontinuance, they will depend upon such omission. And should that occur, the land that N. Heyward will have so abandoned, by his neglect, must, I apprehend, be such as he has described in his declaration. But the Court ought not to do an extra-judicial ex parte act, upon the mere assumption that such neglect is to take place; on the contrary, both parties should be left precisely in the situation they have been placed by the discontinuance. The defendant to enter up judgment, and the plaintiff to look to the consequences that may arise under the Act of 1744, if he should neglect his right of bringing a second action within the time limited. The motion is, therefore, dismissed.

O'NEALL, EVANS, BUTLER and WARDLAW, JJ., concurred.

Wm. F. Hutson, for the motion. *J. D. Edwards*, contra.

(*a*) 3 Stat. 612. *An.*

*233] *G. HEISEMBRITTLE *ads.* CITY COUNCIL.

The City Council of Charleston have the right under the constitution of this State, of passing an ordinance to prevent shop-keepers, (other than those licenced by the city,) from keeping any spirituous liquors, wines, &c., in their shops or in any adjacent room.

Tried in the City Court, before J. AXON, Recorder, at Charleston, November Term, 1841.

This was a process for a violation of a city ordinance, prohibiting the having of spirituous liquors in a room adjacent to his shop. There was no question as to the fact of the liquor being there. The only question was, whether the defendant was owner of the shop. The following is the testimony.

Isaac A. Rutland, sworn, proved the liquor in shop, that defendant was in the charge and management of the store, that he went there as deputy sheriff to arrest defendant on civil process, he asked indulgence until he got some one to put in charge of *his* shop.

James A. Millar, sworn, said he saw defendant at the door of his shop, on 16th January last, has seen him serving at the counter; a charge was made by witness as Marshal, against the owner of this store, for exposing goods on pavement; directed the notice of this charge to Mr. Heisembrittle; the brother of defendant came and paid the fine. Plaintiff's testimony closed.

DEFENCE.

M. H. Meyer, sworn, said that Henry Heisembrittle was the owner of that store, (corner of Church and Chalmers streets,) last January; was at Henry Heisembrittle's store in Meeting street, about that time, when the owner of the house where the shop is kept, brought a lease of it to Henry Heisembrittle. *Cross-examined*, has known defendant two years, witness has been here since 1835, knew Henry about the same time; Henry owned a shop in Meeting street, saw him there week before last; knows that Henry slept at his shop in Meeting street; has been
*234] there with him until eleven o'clock at night, and left him there as his *home; don't know if he owns that shop now. When he first knew defendant, he was clerk on South Bay; has seen defendant at the shop, corner of Church and Chalmers streets, for about twelve months; has seen Henry sometimes in Meeting street, and sometimes at the corner of Church and Chalmers streets.

Henry Heisembrittle, sworn, said he owned the premises at the corner of Church and Chalmers streets, in January last; he paid the fine alluded to by *Millar;* has since sold the shop to *Bulwinkle*. *Cross-examined*, he lives now in King street. Defendant is now clerk of Bulwinkle, at the same shop, he leased the house from Mr. Monzon; his brother (defendant), was his clerk at that shop; don't recollect how much he paid his brother; his brother owed him a great deal, settled with him when he sold the store, came to an account and paid him a balance; his brother came here about two and a half years ago; his brother was indebted to him for his passage out here, and for his board. Witness was here about four years before him; on 18th January last, witness lived in Meeting street, at the corner of Lightwood's alley; his brother managed the store at the corner of Church and Chalmers streets; witness owned that shop three or four months; had no other clerk there; did not set his brother up there.

Charles Bulwinkle sworn, said he now owns the shop at the corner of Church and Chalmers streets; defendant is his clerk; bought it from Henry Heisembrittle, for $550, paid the money to him in his shop in Meeting street; he pays defendant $9 per month for wages. The testimony here closed.

The Court charged the jury, that the testimony of the city may be regarded as proving *prima facie*, that defendant was the owner; but it was submitted to them, whether the evidence of Henry Heisembrittle and

Bulwinkle, did not rebut the presumption created by plaintiff's testimony, and proved conclusively, that the defendant was not the owner, but the mere agent of his brother.

If he was the owner, he was amenable to the penalty of the ordinance; if not, he was entitled to an acquittal.

They found a verdict for the city; and the defendants appealed on the annexed grounds.

*1. That the penalty inflicted by the ordinance can only attach to the owner and keeper of a retail grocery store, and the defendant in this [*235 case was proved by two unimpeached witnesses, to have been only the clerk and not the owner and keeper of the store in question.

2. That the Council had no authority under the charter to pass the ordinance in question.

3. That the verdict was contrary to law and evidence.

Yeadon, for motion, cited City Ordinance, 1 June, 1840. He then commented on the testimony, said the verdict was contrary to evidence. A clerk cannot be held to be the keeper and owner of a shop.

The Ordinance is against common right. Can the city authorities prohibit shop-keepers from keeping liquor in their houses or on their premises?

G. B. Eckhard, City Attorney, contra. The recorder submitted the case very fairly for the defendant, and it being a question of fact alone for the jury, this Court will not interrupt their finding.

Mr. E. contended that this defence was a specious one, and but little reliance should be placed upon the evidence on the part of the defendant. Upon the second ground, he said, that the city council had the right to pass the ordinance, and that it was constitutional. These shops are dangerous. Burglaries, arsons, &c., are traced to these shops; they are matters of record.

This ordinance was produced from necessity. Without this, an illicit traffic with slaves would be carried on by those shop-keepers.

Upon the powers of the city council, under the city charter, cited the city charter, Stat. at Large, vol. 7, p. 81; McM. 326, *Kenedy* vs. *Sowden*.

Curia, per EVANS, J. As to the first ground in the brief, whether the defendant was the owner of the shop, that question was settled by the jury, on what I would regard satisfactory evidence. The second ground presents a grave question, as to the power of the city council to *pass the ordinance under which the defendant was convicted. I [*236 think there can be no question, that the restraints imposed by this ordinance are within the ordinary powers of legislation. There is nothing in the restrictions imposed by the constitution of this State, or of the United States, which restrains the Legislature from passing a general law like the one under consideration, or from granting the power to do so to the municipal corporations within the State: so that the only question is, whether the right to pass this ordinance has been granted to the city council.

By the Act of 1783, 7 Stat. 98, the City Council of Charleston, among other things, are vested with the power to pass "every by-law or regulation that shall appear to them requisite and necessary for the security, welfare and conveniency of the said city, or for preserving peace, order and good government within the same." All such by-laws are by a subsequent part of the same Act, subject to the revisal, alteration or repeal of the Legislature. Under this general power, the ordinance which the defendant has violated, was passed. The ordinance is in these words. "Be it ordained, &c., that no person or persons, now or hereafter owning

and keeping a retail grocery store within the city, where meat, grain, fruit, provisions or other articles are exposed for sale; not having a license from the City Council of Charleston in force, to retail wine, malt or spirituous liquors, shall be permitted to keep in such shop, or in any inner room adjacent thereto, or on the premises connected with such shop, any wine, malt, or spirituous liquors," &c.

The general powers of legislation, on all matters connected with the security, welfare and convenience of the city, and for preserving peace and order and good government within the same, it seems to me are sufficiently comprehensive to cover the ordinance in question. It is, no doubt, one of the many restraints imposed on the liberty of the citizen, to prevent, if possible, the vending of spirituous liquors to slaves. Such regulations are sometimes apparently tyrannical, but they must be submitted to as necessary police regulations. If they are tyrannical and unnecessary, the popular will can repeal them through the city *council, or if redress should fail there, by an appeal to the Legislature.

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The motion is dismissed.

RICHARDSON, O'NEALL, and BUTLER, JJ., concurred.

WARDLAW and EARLE, absent.

See *Copes* vs. *the City Council*, 10 Rich. 491. *An.*

THE CHARLESTON INSURANCE & TRUST COMPANY *ads.* W. NEVE, who sues for the use of C. F. KOHNKE.

1. An Insurance and Trust Company have the right, on a trial upon a policy of insurance, to insist and demand the production of the preliminary proof as a condition precedent to the plaintiff's recovery. But they may, nevertheless, have waived their right to call for such evidence, by some act on their part, when the policy was presented for payment.
2. What is or is not a waiver of the preliminary proof, must depend on the circumstances, and the language used at the time.
3. Where a party took a policy of insurance from an insurance and trust company, upon liquors, groceries, &c., and the same day on which the policy was executed, permission was given by them to assign the policy to a third person, it was held, that the party to whom the assignment was made, was entitled to recover, to the amount of the interest which he had in the policy, notwithstanding the party to whom the policy was granted, had deprived himself of his right to recover, by acts of fraud.
4. The plaintiff, placing the policy in the hands of a third party, to "assure" him, by consent of the underwriters, gave to (Kohnke) the third party, only an equitable interest, but such an interest as a Court of law will recognize, for the purpose of doing justice in a legal proceeding.

Before BUTLER, J., at Charleston, January Term, 1842, who reports the facts of the case as follows:

This was an action of assumpsit, on a policy of insurance, made by the Charleston Insurance and Trust Company, dated the 13th day of May, 1839. The amount insured was two thousand dollars, and the property insured was described in the policy as "stock groceries and liquors,

*contained in the two story wooden house, with shingle roof, situated at No. 31, State street, and occupied by the assured in the [*238 grocery business, as described in the offer, No. 1983, filed in this office." It was in evidence, that this store, which was a grocery and liquor store, had belonged to C. F. Kohnke; that in May, 1839, (the precise day was not fixed in evidence,) Kohnke had sold out the stock to William Neve, for the sum of two thousand and two hundred dollars, and of this sum twelve hundred dollars were paid in cash, and to secure the balance, Neve confessed a judgment in favor of C F. Kohnke, for one thousand dollars. The confession of judgment appears to have been entered up in the office of the clerk of the Court of Common Pleas, for Charleston district, the same day that the policy was executed. At the time of the execution of the policy by the defendant, permission was granted to Neve to assign the policy to C. F. Kohnke. A day or two after the date of the policy, Kohnke, being about to leave this country, placed the policy in the hands of John Klinck, who seems to have been his agent. There was no assignment of the policy, in writing, from Neve to Kohne, at the time that it was delivered to Kohnke. The assignment which is now on the policy, was written subsequently to the commencement of the suit. The sale from Kohnke to Neve was an absolute sale, and Kohnke seems to have retained no interest in the stock, except through his confession of judgment. In November, 1840, Neve applied for insurance on the stock in the same store, to Alexander Robinson, agent for the Columbia Insurance Company. They could not agree as to the rate of premium, and no insurance was at that time effected. The first day of January, 1841, Neve again applied to Mr. Robinson for insurance. Mr. Robinson exhibited some surprise, and asked him if he had been his own underwriter, and asked him, also, if there was any other insurance on the property? Neve told Robinson that there was no other insurance on the property, and after an examination of the premises, Robinson, as the agent of the Columbia Company, insured the stock. The policy of the Columbia Insurance Company described the property insured as follows: "A stock of groceries, liquors, wines, &c., contained *in the two [*239 story wooden building, with shingle roof, and in the cellar, No. 31 State street, Charleston, occupied by him (William Neve) in the grocery business, and as a residence."

On the night of the 27th of April, 1840, the building and entire stock was consumed by fire, and on the 28th, the next day, Neve rendered in a statement to the defendants of his loss, amounting in the aggregate, to $6,500. A question was made in the case, as to the statement, and I have annexed a copy of it to this report. The same day on which Neve rendered his statement to the defendants, or soon after, Mr. Moise, who was the legal adviser of Kohnke, and in whose possession the policy had been placed by Mr. Klinck, the day after the fire, went to the office of the defendants, and gave to the President, Mr. Street, notice of the claim of Kohnke, and seemed to have inquired as to the intention of the Company, for Mr. Street informed him, that he would prefer to submit the matter to the board of directors, before he would give an answer. The next day, or soon after, Mr. Moise called again, and Mr. Street then informed him, that the Company declined paying the amount, because Neve had effected a second insurance, and because the directors believed

that the premises had been fired by Neve, or some objection similar in substance, and manifesting that they supposed Neve had not acted fairly in the matter. Nothing further passed between the parties—and soon after this action was commenced for the present plaintiff.

At the trial of the case, the fire, and the destruction of the building and contents, were proved. The value of the stock was not a matter concerning which the witnesses agreed. The stock in the store was proved to have consisted of groceries, liquors, and some inferior or common dry goods, such as homespuns. And it seems that one side of the store was kept for these dry goods, but the value, as a portion of his stock, was not proved, except generally, that the goods were of a common kind.

Mr. Estill thought the whole stock worth about $4,000, but his opinion was based upon the price that Neve had asked for the stock about six months before the fire, on some occasion when Estill introduced a friend
*240] of his to *Neve, in consequence of learning from his friend, that he was desirous of engaging in that kind of business, and learning also from Neve, that he was desirous of selling out his interest in the stock, and changing his business. Except from this circumstance, and a cursory view of the store, when he was making his purchases, he professed to know nothing of the value of the stock. Mr. Burckmyer thought the stock was worth about $1,500. Mr. Rose, who was engaged to take an account of the stock at the time of the sale from Kohnke to Neve, proved that it was then put down at $2,200. Mr Robinson thought the stock was not worth more than 2 or $3,000. Upon this proof the plaintiff rested his case.

For the defendants, several objections were urged.

1. That there had been no compliance with the eleventh condition of the policy—that no certificate, as is required by the terms of that condition, had been proved to have been submitted to the defendants—that a strict compliance with this, was in the nature of a condition precedent, and without proving performance, there could be no cause of action.

2. That the interest of Kohnke in this stock, was not an insurable interest, and if it was, it should have been so described, in the policy, and so represented at the time of making the insurance.

3. That there was no assignment of the policy. That mere delivery of the policy did not give the holder the rights of an assignee, but only of a depository who had no higher right than the original assured.

4. That the policy being void, so far as Neve was concerned, by the second insurance, which he had made without notice, it was void also in the hands of all parties who claimed through him.

5. That there was sufficient evidence of fraud, to warrant the jury in rendering in a verdict for the defendants.

In relation to the second insurance, the following provision appears in the policy, "and if the said assured, or his assigns, shall hereafter make any other insurance on the same property, and shall not, with all reason-
*241] able diligence, *give notice thereof to this Company, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease, and be of no further effect."

The same grounds that were taken below to resist the recovery, are now taken on the appeal, and I will give the result of my judgment, rather than my reasons for it, on each one, in the order in which they are stated.

1. I regarded a compliance on the part of the plaintiff, with the 11th condition in the policy, as a condition precedent; and that the defendants had a right to require a certificate from a clergyman or justice of the quorum, stating that he believed the property insured had been destroyed accidentally or without criminal design by the plaintiff—no such certificate was produced on the trial. The certificate of one Jeffries was produced, who was not proved to be, nor was he, I believe, either a clergyman or a justice of the quorum. From the fact that plaintiff was advertised by plea of the defendant, that such certificate was required, it might be inferred that he could not produce one; for I am inclined to think, that he would have regarded it as a sufficient compliance with the condition, if the proper certificate had been produced at the trial. Although this preliminary proof was necessary to subject the Insurance Company to liability, it was, nevertheless, in their power to waive it, and to rely exclusively on other grounds of defence; and it was contended, on the part of the plaintiff, that such evidence had been waived, when the policy was presented for payment. This depended entirely upon what Mr. Street said to Mr. Moise—Mr. Moise seemed to have regarded it as a waiver, as the proof was not insisted on at the time, and it may have been so—when, however, the agent of the Company said, that his refusal to pay was founded on the belief that Neve had fired his own house, as well as that he had effected a double insurance, it seemed to me (and I said so to the jury) it was not a waiver of any evidence that was requisite to satisfy the Company that the house was not burnt by design. As I observed by adjudicated cases, that this is always a question of fact to be submitted to a jury, I submitted this to the finding of the jury. What is or is not a waiver of [*242 preliminary proof, must depend on circumstances, and the language used at the time. In general, I think it is right that the Company should insist on the proof, at the time the policy is presented for payment after the loss.

2. It was apparent that Kohnke had no legal interest in the property insured. His only interest was that of a general lien by his judgment, to the extent of $1,000. 1st, was this an insurable interest; and 2d, was it the interest which the Company had in view at the time the policy was under-written? I am now inclined to think, as I thought on the trial of the case, (though I did not think so on the trial of another case with which this is connected,) that a lien by judgment may be made the subject of insurance—it is insurable, provided it be made known to the underwriters to be the subject of the policy. The great security which the underwriters have against the risks insured against, is, that the assured shall have an interest to preserve the property—hence they will rarely insure beyond the interest of the assured. The underwriters consented in this case, that the policy might be assigned to Kohnke, and from that circumstance, they may have been aware of Kohnke's interest. I would infer, however, that they supposed the confession of judgment was for the whole amount of the goods sold. I said to the jury, that if they were satisfied that the Company knew what Kohnke's interest was, they might regard the policy as covering it for his benefit.

3. On this ground I had great doubt—the assignment was not written until after the risk had occurred, but the policy was put into Kohnke's

possession at the time it was executed. Indeed, it was said that Neve never had possession of the paper—was the delivery to Kohnke a good assignment? The policy being a chose in action, was not assignable, so as to give the transferee the right to sue on it; or to enforce any strict legal right in his own name. Assignment of such papers will give the assignee such equitable rights as will be respected in a court of law, and if the policy was sufficiently assigned, the Court ought to give to the
*243] assignee the profit of it, in the name *of Neve, the original assignee, or the person in whose name the property was insured. For the purpose of having all the points in the case decided, I told the jury that an assignment of the policy by parol, should be regarded as sufficient.

4. If the plaintiff was entitled to recover at all, what should be the measure of damages? The action was in Neve's name, and was brought to recover $2,000—and a recovery for that amount ought to have been had, if the policy were not affected by a subsequent double insurance. Neve did procure another policy to be effected in the Columbia office, on a stock of goods of the same description as those described in the policy, and the finding of the jury establishes the fact, which was well warranted by the evidence, that the last policy was procured by fraud and misrepresentation, otherwise it would not have been underwritten by Robinson, the agent of the Columbia office. Where the assured have double policies, they have little interest to take care of the property insured, and might yield to a criminal temptation to destroy it. Was, then, the making the second policy a double policy? This depends on the character of the first, and Neve's interest in it. But for the last, the first would have been good for $2,000, to be divided between Neve and Kohnke. As far as Neve's interest was concerned, I thought it forfeited by his fraud. Did this deprive him of the right of recovering for Kohnke the extent of his equitable interest?—I thought not. The jury found against the defendants on all points in which Kohnke was concerned, and found for the plaintiff the amount of Kohnke's interest in the policy, to wit, $1,000 with interest.

Statement of the loss of William Neve on his stock in trade at the fire on the 27th April, 1840, in the Charleston Insurance and Trust Company, for $2,000, assigned to C. F. Kohnke—store situated in State street.

Amount of stock in store, $6,500, which consisted of liquors, to wit:	
Wine and Brandy, - - - - - - - - -	$5,300
Porter, Ale, and Cider, - - - - - - - - -	200
Groceries, to wit:	
Sugar, Tea, and Rice, &c., &c., - - - - - -	1,000
	$6,500

There was nothing saved.

*244] *GROUNDS OF APPEAL.

1. That the condition in the policy, as to the mode and form of stating a loss, is a condition precedent, on the part of the assured, and that until the loss and claim is made as directed in the said condition, there is no cause or right of action against the insurer. That in this case, there was no sufficient proof of a waiver of a preliminary proof, or any part of it.

2. That the party plaintiff, must prove an interest existing at the time of the

making of the policy, and at the time of the loss. And that in this case there was no proof of an interest at the time of making the insurance.

3. That a policy on groceries and liquors, assigned to a judgment creditor, does not protect the judgment creditor in case of loss. Because a judgment is not an insurable interest, and because if it is, it is not covered by a policy on groceries and liquors, but ought to be described specially.

4. That an assignment of a policy of insurance, to be valid, so as to entitle the assignee, to a right of action against the assured, must be a perfect transfer of the right of the assignor, executed in as formal a manner as the instrument to be assigned.

5. That the possession of a policy without assignment in writing, gives the party holding the policy, only the rights of a depositary, and makes him liable to all the defences against the original insurer.

6. That the second insurance by Neve vitiated his claim, and all parties claiming through him. That Kohnke, being a mere depositary, and claiming through Neve, is barred of all claim, from Neve having avoided the policy by a second insurance, without notice.

7. That the facts of the case sufficiently made out a case of fraud, which is sufficient to avoid the policy of insurance.

8. Because the verdict was in other respects against law.

Magrath, for the motion, cited first, as to the question of preliminary proof, 6 T. R. 710; 2 H. B. 577, note; 1 H. B. 258; Hughes on Ins. 390; Ellis on Ins. 10. The conditions* of the policy, Mr. Magrath contended, must be complied [*245 with: cited 6 Wend. 488; 2 Pet. 53; 7 Cow. 465; 12 Wend. 457; Phill. on Ins. 156, 157. The conduct of the president of the company did not dispense with the necessity of the preliminary proof; was there in the acts of the president any waiver?

2. Was there an insurable interest? cited 1 Phill. on Ins. 27; 4 B. P. C. 431; Ins. 18.

3. If there is an interest, it must be set out fully and truly: cited 1 Phill. 64; 4 Taun. 331; 2 J. Cas. 353; 3 Burn. 1401.

4 and 5. As to the assignment, cited Bac. Abr. Title Assignment; 2 Co. 566; the note J. Phill. on Ins. 11. The assignment must be a perfect transfer of the right of the assignor, executed in as formal a manner as the interest assigned. One in the possession of an interest delivered to him as a lien for his security, has a mere authority to receive in the name of the principal; and hence any defence against him is good: 10 Sarg. & Rawl. 412; Harp. 334. He has a mere equity, and is of course liable to the same defences which the original insurer would have. The assignee is considered as the original insurer. 5 Pick. 81; 8 Wheat. 268.

The 6th ground depended upon the previous assignment.

Kunhardt, contra, said, 1st. That the preliminary proof might be waived; and in support of this proposition cited 6 H. & J. 408. The proof will not be required, when payment is demanded it is considered as waived: 2 J. 192.

2nd ground, cited Phill. on Ins. 17. If there is a possibility of loss, the party has an insurable interest: Phill. on Ins. 53; 1 Marsh. on Ins. 105; 2 Ib. 789. Is it necessary to mention the interest? 10 Pick. 40; 1 Caines, 276. Both of those cases decide that question in the negative.

3rd. He contended that the policy was for the benefit of *Kohnke*, 9 Wend. 404. No act done by *Neve* could affect Kohnke, 1 N. & McC. 449; 5 Wheat. 277; 2 Bay. 209; 9 E. 72; Park. on Ins. 280. A party having a partial interest may recover the whole amount assured, 18 Pick. 523.

Moise, on same side, alluded to the attempt of the *Insurance Company [*246 to get rid of their liability, on technical grounds, as being inconsistent with general principles. 1st. Is there any evidence that Jeffreys is not a magistrate or a clergyman? It is for the defendants to show that he was not a magistrate or clergyman; cited 6 Cow. 404; Dud. 150; 7 Cow. 465. The proof was waived by the president with the consent of the directors; this was sufficient, 20 Pick. 389; waiver, or that proof was made, may be presumed, 2 Wend. 64; the silence of

the defendants is evidence of a waiver, 10 Pet. 540; 9 Wend. 404. A mortgagor or mortgagee each may insure, and the mortgagee may insure in the name of the mortgagor. 1 Bay. 246. Interest insurable, Marsh. Ins. 91; any thing is insurable, 1 Pet. 163; 3 Kent. Com. 276; pecuniary loss is enough. The consent of the Insurance Company, and the possession by Kohnke, is evidence sufficient of the assignment to him. Harp. 156; payment to the holder of a bond endorsed in blank discharges the obligor. The company made the policy negotiable by their consent. 1 Hill, 172; an assignee may fill up a blank assignment. 3 Coke. Rep. 26; 8 Ib. 85; 1 Salk. 301; 1 Burr. 502; Shep. Touch. 58; 2 Tread. 770. A deed delivered for the use of another is sufficient.

Curia, per BUTLER, J. This case presents some questions of intricacy, rather from the confusion with which the parties have made their contract, than from any difficulty in pronouncing on the justice and legal character of the principles involved Policies of insurance are made on the confidence that the contracts under them will be observed and kept in good faith by all the parties connected with them; and they should be freely and liberally construed by Courts to effect the intention of the parties; when the risk occurs which is covered by the policy, the underwriter should promptly indemnify the assured, without evasion or complaint. On the other side, the policy should always be obtained on fair representation, and the risk should not be subsequently increased by fraud and misrepresentation. The finding of the jury in this case convicts Neve of a fraud, and is a censure on the company for insisting on the preliminary proof, so far as Kohnke is concerned; one may be *247] just, but I think the *other is not; I thought at the circuit, and am still inclined to the same opinion, that the defendant had a right to insist at the trial on the production of the preliminary proof, as a condition precedent to the plaintiff's recovery. A majority of the Court think, however, that the proof was waived by the company when demand was made for payment of the policy, and they therefore sustained the finding of the jury on this point. It is always in the power of the underwriter to insist on the evidence alluded to, at the time the policy is presented for payment; and when it cannot be produced by the assured, it would be strong evidence that the risk had not been the result of accident. At any rate, having contracted with the underwriters, that a stranger would do some act to entitle the assured to recover, the stipulation, however unreasonable, must be complied with; I do not think myself that such a stipulation is unreasonable. It is founded in prudence, and should not be dispensed with on the part of the underwriter, when there is good ground to believe that the risk has been brought about by fraud and criminal design. The defendants in this case may have forborne to demand the preliminary proof, under some apprehension that if it had been produced, it might have prejudiced their case on the trial of the main issue. I do not think that any intention of a waiver on their part. But their conduct may have deceived others, who might have been able at the time to comply with a specific regulation, if it had been made. And as they did not make the requisition at the time, it is perhaps right. This point must therefore be regarded as ruled against the defendants by the verdict of the jury.

All the other grounds resolve themselves into this question. Had Kohnke, at the time the policy was executed, or afterwards, any interest

in it that can be recognized and protected in a Court of law? And if so, was it such an interest as could not be destroyed by the hand of Neve? Which involves the further question, had Neve any interest at all in the policy after it was transferred to Kohnke by delivery; retaining no right in himself? It is certain that by the terms of the policy Kohnke had no legal interest in it that could be enforced in his own name. The policy is taken in Neve's name on property of which he *had the legal title. The premium of two thousand dollars for property valued at three thousand, at the rate of two and a half [*248 per cent, was paid by him. In placing it in possession of Kohnke, by the consent of the underwriters, to "*assure*" Kohnke, as it is expressed, he gave Kohnke thereby only an equitable interest.(*a*) Such, however, as a Court of law will recognize for the purpose of doing justice in a strictly legal proceeding in the name of the assured. Had the policy been assigned in the most solemn form, it would not have given Kohnke a legal right to sue in his own name, or to insist on any legal right. In such case he would have had no more than an equitable interest. As a depository, he has the same interest, if the policy was delivered to him before the risk happened, of which there could be no serious doubt. Whatever his interest was, though equitable, we think was acquired *bona fide* by the consent of the company. They knew the circumstances under which the goods was insured; that they were in the actual possession of Neve, while the other had a general lien on them. And the company undertook to protect this general lien by letting the policy go into the possession of Kohnke as his assurance; and they could not deprive him of the benefit of this security without fault on his part. If it had been otherwise, perhaps, the risk would not have happened, as it may have increased Neve's interest to procure another policy, and diminished his diligence in taking care of the goods in his store. The vigilance of self-interest is the eye of prudence; and when that is weakened, the underwriters of a policy increase the danger of their liability. They must do what they intended for Kohnke, and cannot let his rights suffer by the wrongful acts of Neve. We think, therefore, that as this action was in fact for Kohnke's benefit, he was entitled to be indemnified to the extent of his injury. According to this view, it will appear that Kohnke had not an absolute, exclusive and indefeasible interest in the policy; but that as an additional security to his confession of judgment it was contingent, collateral and cumulative. In no event was it worth to him more than $1000, whilst it might have been worth to Neve $2000. Could it be questioned that Neve had it in his power to redeem this *security, and to acquire a perfect right to it by satisfying the judgment? Suppose he had paid [*249 off the judgment in two days after it was confessed, would the underwriters of the policy have been entirely discharged? Such a pretence, on their part, would have been inconsistent with common sense, and their undoubted intention at the origin of their contract. They never could have supposed that they had improved their condition, when they consented that Kohnke should be assured or have an assignment of the policy. They always regarded themselves as liable for $2000, provided goods to that amount should be destroyed accidentally by fire. The

(*a*) See 5 Strob. 146; 11 Rich. 437; 7 Rich. 405.

fact of suffering two parties to be interested in the same policy, could not diminish their liability. As an action on a policy of insurance is one of indemnity, no party can recover beyond his loss; and if but twenty dollars' worth of goods only had been destroyed by the fire, no party could have recovered beyond that amount; and for the like reason, should no party be allowed to recover beyond his actual interest. The jury, therefore, properly restricted the recovery of the plaintiff in this case, to Kohnke's loss, notwithstanding goods to a larger amount may have been destroyed; for Neve, by his own unfair dealing, subsequently deprived himself of any right to avail himself of any interest under this policy; as it contains the common clause, that if any subsequent policy should be obtained on the same stock of goods, without notice, this policy should be void. As it will appear, in another case, a secondary policy was obtained without notice, and for that reason it is right that Neve should forfeit his rights under this by his own fraud. It is said, however, that Neve having parted with all right to this policy, he had no interest in it; and, therefore, he was at perfect liberty to procure another without notice. That suggests a recurrence to the question, what interest had Kohnke in this policy? I have before said that he had the defeasible interest of a surety—and I think that this view is fully supported by the final judgment in the case of *Robert* vs. *The Traders' Insurance Company*, 9 Wend. 404, 474; 17 Wendall, 631. In that case Robert had procured policies of insurance on certain buildings, which were mortgaged to one Bolton. The policies, by the consent of the com-
250] pany, were assigned to Bolton. After the houses were burnt, Bolton, in the name of Robert, recovered judgment on his policies; this judgment was paid off by and assigned to Robert—who thereby claimed all the rights intended for him under the original policy, and it was decided that his right to the policy was restored so soon as he removed the mortgage, or paid the judgment rendered on its foreclosure. The case was elaborately considered and carried through all the Courts of New York. See it as reported in Wendell, 631. Senator Edwards delivered the final judgment in the Court of Errors. Speaking of this question, he says: "Let us then in the next place inquire how far the rights of the parties were affected by the assignment. Thomas Robert owed Francis Bolton a debt of $5500, secured by his bond and mortgage on the buildings in question, &c. He owned three policies of insurance, in each of which it was stipulated that the interest of the assured was not assignable without the consent of the company manifested in writing. That right being obtained, &c., the policies were assigned to Bolton, as collateral security for the payment of his mortgage. Did the fact, that they were so assigned, give Bolton the absolute indefeasible interest in the policies, or only a collateral interest for the time being? I am of opinion that he had only a collateral interest, liable to be divested whenever Robert paid the mortgage; and when the company consented to the assignment, they consented to it for the purposes for which it was made, and this consent gave him the right then; but this could not alter or diminish the extent of the liability of the company." This case does go so far as to say that after Robert had made his assignment, he could take another policy on his interest as mortgagor without notice of the policy assigned. I suppose that was on the ground that he could act *bona fide*

in taking a subsequent policy whilst the right under assignment subsisted. Whether I could sanction, by my judgment, this part of the case, I am not called on to determine. For the right of recovery on the different policies, would depend on the interest at the trial—and the second policy might be worth little or nothing, if there could have been a full recovery on the first. The point I wish to present, *is, that the first policy was not absolutely vested in the assignee, Kohnke— [*251 and all that could be recovered on it was Kohnke's interest, when Neve had forfeited his right under it. Had Kohnke held the policy under an assignment made cotemporaneously with its execution, as his only security, then he would have been entitled to recover the whole amount, provided the goods destroyed were of no less value than that amount at the time of the fire. In *Hambleton* vs. *Mead*, 2 Burr. 1210, Lord Mansfield said: "the plaintiff's demand was for an indemnity; his action then, must be founded on the nature of the damnification, as it really is at the time of the action brought." The recovery of Kohnke might have been less than the $1000, but could not have been more. This shows that he had not the entire interest in the policy; and if the whole amount could have been recovered, it would have been as much for the benefit of Neve as Kohnke—the one having a legal and the other an equitable interest. Neve's right became extinguished by his taking another policy without notice of the existence of the first. In attempting to procure two policies, he forfeited, by the terms of the policies themselves, his right to recover on either, as will be seen when the case of the Columbia Company comes to be considered. We think the jury have hit the justice of the case, and therefore refuse this motion to set aside their verdict.

RICHARDSON, O'NEALL, EVANS, BUTLER, and WARDLAW, JJ., concurred.

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*BOIES & STUKE *ads.* THE STATE.(*a*) [*252

Where two persons were jointly indicted for receiving stolen goods, and one of them was acquitted, the acquittal of one does not operate as a discharge to the other.

Before EARLE, J., at Charleston, May Term, 1841.

The defendants were jointly indicted for receiving stolen goods; pleaded not guilty, and were tried together. The verdict was, guilty as to Boies, and not guilty as to Stuke.

There had been a former indictment against them for the same offence, including the charge of larceny; and on the hearing, this was quashed by the Circuit Court;(*b*) the Attorney-General appealed from this decision, and this motion was still pending when the present indictment was found by the grand jury. The counsel for the defendants relied on this to abate the present prosecution, and pleaded it in abatement, or had leave to do so. But the plea was overruled, and the case was sent to the jury, who, on very

(*a*) Same parties, two other cases, 1 McM. 189, 191. *An.*
(*b*) 1 McM. 189. *An.*

clear evidence, convicted Boies. The Court overruled the other ground taken, that as they were jointly indicted, there must be proof of a joint receiving, and that both must be convicted, or neither; and the jury were instructed that they might convict both, or either, according to the evidence.

A motion was made in this case, in arrest of judgment, or for a new trial, on the following grounds:

1st. Because the indictment, in this case, charged a joint receiving, and the acquittal of one of the defendants, operated as a discharge to the other.

2d. Because the evidence in this case did not prove a joint receiving, which was necessary to the conviction of the defendants, under the charge in the indictment.

3d. That his Honor erred in refusing permission to the defendants to plead in abatement, *nunc pro tunc*, the pendency of a prior prosecution for the same cause, ruling that such a plea was immaterial.

4th. That the defendants having been jointly indicted for a joint offence, a conviction against one only, cannot be supported, and his Honor erred in so charging.

*253] *5th. The verdict was contrary to law and evidence.

Kunhardt and *Yeadon*, for the motion, cited, in support, 2 Eng. Crown Cas. 257.

H. Bailey, Attorney-General, contra.

Curia, per EVANS, J. The first, second and fourth grounds in this case, are founded on the supposition, that as the defendants were indicted for a joint offence, the proof, to authorize the conviction of either, must correspond with the allegation. On the civil side of the Court, if a joint contract be alleged, the proof must correspond; but for torts, the rule is different; a verdict may be rendered against as many as are proved to have participated in the tort; and for those who are not guilty. The same rule prevails in the Criminal Court. The indictment may charge many, but if the proof be only against one, he may be convicted and the others acquitted. The authority cited from 2 English Crown Cases, 257, does not, as the defendant's counsel supposed, sustain his position. It goes no further than to maintain what no one doubts, that successive acts cannot be given in evidence under a count charging a joint act. The third ground was not argued, and is considered as abandoned. The motion is refused.

RICHARDSON, O'NEALL, BUTLER and WARDLAW, JJ., concurred.

EARLE, J., absent.

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*254] *THE COMMISSIONER IN EQUITY *vs.* THOMAS MCWHORTER.

Where an unauthorized inquiry has been instituted in the Court of Chancery, and so declared by the Court itself, the deposition of a witness who deposed in the chancery case, and who has since died, will not be received by a court of law in a subsequent cause between the same parties.

Before O'NEALL, J., at Barnwell, Spring Term, 1841, who reports as follows:

The negro slaves of the late Charles Milhouse, deceased, not specifi-

cally devised by his will, were, under the decree of the Court of Equity, sold at Blackville, for the purposes of partition. At that sale, the negro man Bob was sold for $670 or $680, his full value, and purchased by the defendant, (McWhorter,) for Dr. Tarrant, into whose possession he went immediately after the sale, and so continued until his death, which took place in four or five months after the sale. Bob was an elderly man, between fifty and sixty years of age. This bond was given for his price. It was alleged that Bob had the dropsy, in an incipient stage, at the time of the sale, and that he died of it. The Rev. Darling Peeples saw him in five or six days after the sale; he was short-winded, (breathing short and quick,) weak, swelled, appeared to be sickly and diseased, and looked like he might have the dropsy; he was of no use, and died in a short time. He said that his observation of Bob was when he came to his house for a load of corn. Mr. Lartigue (of Blackville) said he had Bob on hire one or two years before the sale. He was frequently sick five or six days at a time: he coughed on such occasions. He said Dr. Tarrant and Mr. McWhorter frequently saw Bob at Blackville; and for a short time before the sale, Bob had a wife at Dr. Tarrant's. He (witness) was next to the last bidder for Bob; he did not think he had the dropsy at the sale. Mr. Connel proved that he knew Bob; he, while at Blackville, frequently seemed to be unwell; he thought it deception. Dr. Haigood stated that a difficulty of breathing increased by action, and a dry cough, were the evidences of dropsy in the chest. It was, he said, a disease slow in its development, but one which rushed rapidly to a termination, when the disease was matured.* He said he could not speak with cer- [*255
tainty of the nature or origin of Bob's disease, without a history of his case.

On the part of the plaintiffs, Mr. Tyler, one of the executors of Charles Milhouse, but having no interest in the property sold at Blackville, was sworn. He, as one of the executors, had hired Bob out for five or six years before the sale. On the day of sale, he said Bob looked as well as usual. He knew nothing, he said, of the negro being diseased at any time before the sale. M'Whorter and Dr. Tarrant knew the negro better than he did.

This was the substance of all the evidence given on the question of soundness. The defendants proposed to read the examination of Dr. Amoka, (a witness who died before the trial,) taken under the following circumstances: The commissioner reported the sales of the negroes of Charles Milhouse, deceased, to the Court of equity for Barnwell, at its sitting succeeding the sale. At the instance of the purchaser, the question of Bob's unsoundness was referred to the commissioner; he examined and heard testimony, and amongst other witnesses, he took the testimony of Dr. Amoka, (who, it was alleged, attended Bob in his last illness,) and reduced it to writing. Upon the coming in of the commissioner's Report, the Court of equity decided that it had no jurisdiction of the question of soundness, and therefore refused to make any order for the relief of the purchaser. Under these circumstances, I thought the witness had not been examined in a case between the parties now before the Court, and in which the point now in issue was involved, and that therefore, I could not receive the evidence.

The defendants insisted they were entitled to the reply in proof and

argument. They had pleaded on the record *non est factum*, and had given notice in writing that they would rely on the unsoundness of the negro, as a ground of defence. On the trial, the execution of the bond was admitted; but I am not aware that there was any written admission, other than that which might be implied from the notice of defence predicated of the unsoundness of the negro. I held as I did in the *Administrators of Gray* vs. *Cottrell*, 1st Hill, 38, (which ruling met the approbation of *the Court of Appeals,) that the reply in evidence and argument depended on the question, who was the actor on the pleadings. The plea of the general issue, *non est factum*, made the plaintiff the actor; and any admission of the cause of action, with that plea on the record, made it necessary for the plaintiff to read or call for such an admission, to entitle him to recover.

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The case was fully and fairly submitted to the jury, on the question of soundness. They found for the plaintiff. The defendants appeal, on the annexed grounds.

GROUNDS OF APPEAL.

1. Because his Honor rejected the testimony of Dr. Amoka, a witness who had been examined in the Court of Equity in a trial between the same parties, and in relation to the same subject matter, whose testimony had been reduced to writing by the consent of counsel, and whose testimony ought to have been admitted in the trial at law, the witness being dead.

2. Because his Honor refused to the defendants the right of reply in evidence and argument; although the defendants, both on the trial and previously, in writing, (as part of the pleadings,) admitted the plaintiff's case, and took upon themselves the burden of the proof.

3. Because the verdict, (on the merits,) was contrary to evidence and law.

Mr. Bellinger, for motion. 1st, As to Amoka's testimony, 1 Stark. on Ev. 280; 2 Ib. 264. See *Johnson* vs. *Wideman*, Dud. Law Rep. 325. "It seems to be a general rule that the depositions or evidence in a former cause are never admissible in evidence, unless the verdict or judgment would in itself be evidence;" 1 Stark. on Ev. 267. To admit a deposition on the oral testimony of a witness in a former cause, it is necessary to show that such a cause or proceeding legally existed, for otherwise it would not appear that the deposition was any thing more than the mere voluntary affidavit of a stranger.

Mr. Patterson, contra. 1st ground, Three insuperable objections; 1st, no case; 2d, no parties; 3d, no jurisdiction. 1 Stark. on Ev. 267. Such a cause must have legally* existed; 12 Vin. Ab. Tit. 109, 31, *Stork* vs. *Derer*. Depositions *coram non judice* not evidence; 1 Phill. on Ev. 269. "If the suit in equity be dismissed for the irregularity of the complainant, it has been said that the depositions in that case cannot be read in any fresh suit. Thus, where a devisee brings a bill of revivor on a suit commenced by his devisor, and depositions are taken, and then the cause, on the hearing, is dismissed, because a devisee, claiming as a purchaser, and not by replevin, cannot bring a bill of revivor, the devisee will not be allowed, on exhibiting a new original bill, to use the former depositions; for in the first cause, in which the complainant mistook his remedy, there was no complaint regularly before the court, and consequently there could not regularly be any depositions."

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Curia, per O'NEALL, J. The first ground of appeal raises the question whether the depositions of Dr. Amoka, a deceased witness, were admissible in evidence. In addition to the general statement made in the report, I will, before I examine the question of admissibility, state the view Chancellor Dunkin took of the proceeding, under which the

depositions were taken. He said, "this is not a rule against the purchaser at the commissioner's sale, requiring him to comply with the terms of sale; but it is substantially a summary application on the part of the purchaser, to obtain the aid of the Court in rescinding a contract already completed, and on grounds, which, if available at all, would afford a *perfect legal defence to the enforcement of the contract.* I may add, that if I had taken a different view of this point of the case, I should certainly have deemed it necessary to order an issue, as the testimony adduced has not enabled me to form a satisfactory opinion.

I regard the former order of reference as merely an inquiry into the facts, and the judgment of the Court thereon.

The facts disclosed do not appear to me to make a case for the interposition of the Court. The motion of the purchaser, Thomas M'Whorter, for the re-delivery of the bond and mortgage, is dismissed.

The rule under which the depositions of oral testimony* of a deceased witness in another cause is received in a case on trial, is very well stated in 1st Stark. on Ev. 267. "To admit a deposition or the oral testimony of a witness in a former cause, it is necessary to show that such a cause of proceeding legally existed; for otherwise it would not appear that the deposition was anything more than the mere voluntary affidavit of a stranger." In the same book, and at the same page, the following test of admissibility under this rule is given: "It seems to be a general rule, that the depositions or evidence in a former cause are never admissible in evidence, unless the verdict or judgment would in itself be evidence." Looking to this it would seem to be plain, that when no judgment could be given, that of course the testimony would be inadmissible. In the case in chancery, no judgment could be given, for the want of jurisdiction on the point (whether the bond should be enforced,) now in issue between these parties. Hence, no evidence heard in that cause, could be evidence in this. It is, however, beyond all controversy, that no cause ever legally existed. For an unauthorized inquiry in chancery, and so declared to be by that Court, will not justify the reception of the depositions of a witness examined under it, and who has since died, in a subsequent cause between the same parties. For, when the Court originating such an inquiry declares it to be illegal, it is the same as if it had never been made. The reference and motion to rescind the contract, by delivering the bond and mortgage to the purchaser, was an attempt to try a plain legal question, a question of unsoundness, arising originally, and not collaterally, in the Court of Equity. This was properly refused by the chancellor, and dismissed for want of jurisdiction. A proceeding without jurisdiction, is as if none in fact had existed. [*258

In 1st Phill. on Ev. 289, it is stated to be law, "If the suit in equity be dismissed for the irregularity of the complainant, it has been said that the depositions in that cause cannot be read in any fresh suit. Thus, when a devisee brings a bill of revivor on a suit commenced by his devisor, and *depositions are taken, and then the cause is dismissed, because a devisee claiming as a purchaser, and not by representation, cannot bring a bill of revivor,* the devisee will not be *allowed, on exhibiting a new original bill, to use the former depositions; for, in the first cause, in which the complainant mistook his remedy, there was [*259

no complaint regularly before the Court, and consequently there could not regularly be any depositions." This authority reaches completely the point before us. For if, when a bill is dismissed on account of the plaintiff's mistaking his remedy, depositions taken in it are inadmissible in a fresh suit, it would seem to be clear, that depositions taken under a rule of reference, which is afterwards declared to be illegal, cannot, in any after case, be received as evidence. For, in the language of the authority, "there was regularly no complaint before the Court, and consequently there could not regularly be any depositions."

The second ground is concluded by the authority referred to in the report, and by the case of *Johnson* vs. *Wideman*, Dudley's Law Rep. 325.

The motion is dismissed.

EVANS, BUTLER and WARDLAW, JJ., concurred.

RICHARDSON, J. I think the evidence of Dr. Amoka was competent, and therefore I dissent.

THE STATE OF SOUTH CAROLINA, } *To wit:*
BARNWELL DISTRICT. }

Thomas M'Whorter, Richard W. Walker, and William P. Walker, were summoned to answer to Alfred P. Aldrich, successor in office of Gasper J. Trotti, Commissioner in Equity for Barnwell, of a plea of debt, that they render unto him the full and just sum of thirteen hundred and forty-six dollars, which to him they owe, and from him unjustly detain, and so forth. And whereupon, the said plaintiff, by Patterson, his attorney, complains that whereas, the said defendants, on the thirteenth day of February, in the year of our Lord one thousand eight hundred and thirty-seven, at Barnwell, in the district and State aforesaid, by their certain writing obligatory, commonly called a bond, sealed with the seal of the said defendants, acknowledged themselves held and firmly bound unto the said Gasper J. Trotti, commissioner as aforesaid, in the aforesaid sum of thirteen hundred and forty-six dollars, to be paid to the said Gasper J. Trotti, his successors in office, or assigns, when they should be thereunto afterwards required. Nevertheless, the aforesaid defendants, although often required, the said sum of thirteen hundred and forty-six dollars have not as yet rendered, but the same to the said Gasper J. Trotti, as such commissioner, or to the said plaintiff, his successor in office, refused, and still refuse to render; wherefore, the said plaintiff, as commissioner aforesaid, is worse and hath sustained damage to the value of one hundred dollars, and therefore he brings suit, and so forth. And the said plain-
*260] tiff produces here in Court, the writing obligatory *aforesaid, which testifies the debt aforesaid, in the form aforesaid; the date whereof is the day and year above written, and so forth.

PATTERSON, *Plaintiff's Att'y.*

And the said defendant saith that the within supposed writing obligatory is not the act and deed of the said defendant, and of this he puts himself on the country, and so forth.

BELLINGER & WIMBISH, *Defendant's Att's.*

The plaintiff will take notice that the defendant admits the execution of the bond, and under the Act of Assembly of 1831, will offer evidence to show that the negro, (for whose purchase the bond was given,) was diseased at the time of sale, and of no value.

BELLINGER & W., *Defendant's Att's.*

And the plaintiff doth the like.

PATTERSON, *Plaintiff's Att'y.*

CLERK'S OFFICE, } I hereby certify that the foregoing are true copies of the
Barnwell District } declaration, plea, notice and *similiter*, in the order in which they stand on the original record.

ORSAMUS D. ALLEN, C. C. P.,
Per V. J. WILLIAMSON.

Ann Beck *vs.* W. E. Martin.

The general rule of law is, that partners are bound by the acts of each other; and where one of a law partnership obtains the possession of a letter (containing an authority to take care of the interests of the plaintiff,) directed to the other partner, and acted under the instructions contained in the letter, it was held, that the plaintiff was bound by the act of the partner, as much so as if he to whom the letter was directed had received it, and acted upon it.

Before Richardson, J., at Gillisonville, Fall Term, 1841.

This was an action of trover to recover a negro, (Richard.)

Ann Beck held a mortgage of Richard and several other negroes, from her brother, Josiah Beck. Col. Rice, sheriff of Colleton district, got possession of the mortgage; and having also junior *fi. fa's.* against Josiah Beck, sold Richard at public out-cry; and the defendant, W. E. Martin, became the purchaser.

*The question made was, whether the sale so made precluded the rights of Ann Beck, under the mortgage, and vested the title to Richard in the purchaser, under the circumstances attending the sale. [*261

Ann Beck had, through her agent, Williams, enclosed the mortgage in a letter to Albert Rhett, authorizing him to take care of her interest, &c. Rice, the sheriff, received this letter, took the liberty of opening it, and having so got possession of the mortgage, sold Richard, under it, on sale-day in April, 1840. This happened during Court at Walterborough. But Albert Rhett did not arrive till the day after, and knew not of the agency confided to him by Ann Beck, before his arrival.

In the mean time, his brother and professional partner, Edmund Rhett, had arrived on sale-day, and hearing of the sale intended under the mortgage, got possession of it from Rice, and also of the letter to Albert Rhett, and forbid the sale. Wm. Branch, deputy-sheriff, stated, that after Richard had been bid off, Edmund Rhett directed Rice to tender the bill of sale to the purchaser, and demand the money. This statement was altogether denied by Edmund Rhett. Rice, however, made the bill of sale, and received the purchase money. This summary may perhaps be sufficient, as the grounds of appeal turn chiefly upon the charge to the jury.

The presiding Judge charged the jury, that the rights of Ann Beck could not be affected by the sale so made by Rice; that, as her agent, Albert Rhett did not even know of his agency, till after the sale; Edmund Rhett could not have been his sub-agent, under any implication; that Edmund Rhett being the professional partner of Albert Rhett, did not, of itself, authorize him to act in the place of his absent brother, so as to affect the rights of Ann Beck, even if he had directed the bill of sale to be tendered, &c., as stated by Branch. The agency was to Albert Rhett alone.

The plaintiff ought, therefore, to recover, and the defendant be left to his own resort to Rice, who had assumed the agency without authority.

The jury found for plaintiff, and the defendant appeals, on the grounds:

*1. Because his Honor charged that the sheriff was not authorized to sell under the mortgage. [*262

2. Because his Honor charged that an agent cannot appoint a sub-agent.

3. Because, although it was proved that Messrs. E. & A. Rhett were partners in business, his Honor charged that Mr. Ed. Rhett could not confirm the sale, because the mortgage had been enclosed in a letter directed to Mr. Albert Rhett.

4. Because his Honor charged that a mortgage sent to a lawyer was not a professional matter, but was private business.

5. Because if the sheriff proceeded under mistake, it was caused by the plaintiff's agent, and she is bound.

6. Because a purchaser is not bound to inquire into the regularity of a sale, when he sees a vendor in possession of a legal instrument.

7. Because the verdict was, in other respects, contrary to law and the evidence.

W. F. Hutson, for the motion, said:

1. A mortgage sent to a lawyer is professional business. The profits arising from such business is considered a part of the partnership profits; that it is directed to one partner instead of the firm, does not alter the question. It was proved E. & A. Rhett were partners in Walterborough; that Ed. Rhett confirmed the sale by Rice, and his connexion with his brother made him Miss Beck's agent, and his confirmation was the confirmation of his principal.

2. A party purchasing is not bound to inquire into the regularity of the proceeding, if he sees the vendor in possession of a legal instrument. So of *fi. fa.* 1 Bail. 512; why not of a mortgage?

3. A mistake occasioned by a party's agent is binding on the party; 10 B. & C. 755; 2 Bay, 90, 112; 2 M'C. R. 251. If there is any mistake, it was occasioned by Miss Beck' agent, Mr. Rhett.

4. Miss Beck's agent stood by, and did not forbid the sale until the negro was bid off. She is bound; 1 N. & M'C. 334.

Colcock, contra.

*263] *Curia, per* EVANS, J. It appears from the report of this case, that the presiding Judge charged the jury that "Edmund Rhett's being the professional partner of Albert Rhett, did not of itself authorize him to act in the place of his absent brother, so as to affect the rights of Ann Beck, even if he had directed the bill of sale to be tendered, &c., as stated by Branch." The agency was to Albert Rhett alone. The correctness of this as a legal proposition, is brought in question by the grounds of appeal, and it becomes the duty of this Court to decide it. The business confided by William's letter to Albert Rhett, was to take care of the plaintiff's interest against Beck's creditors. This he could only do by ascertaining what her rights were, according to law, and then decide what course would best protect and secure them. Her rights were in collision with the creditors of Beck; and to decide what these rights were, as well as how they were to be protected and secured, were questions requiring legal knowledge to decide and determine. The business, therefore, committed by the plaintiff to Mr. Albert Rhett, was one which had connection with his professional employment; and if, in the exercise of the authority thus committed to him, he had ordered the sale of the negro, or had received the money afterwards, in confirmation of the sale, there would be but little doubt that the plaintiff would have been bound. Assuming, therefore, (and I think there is no reasonable ground to doubt it,) that the business committed by William's letter to Mr. Albert Rhett, was professional, is not he, and consequently his principal, bound by the act of Mr. E. Rhett, the professional partner of Albert Rhett? The general rule is, that partners are bound by the acts of each other, in all matters within the scope of the partnership business. It is

on the principle that the act of one is the act of both ; that each agreed, on the formation of the partnership, that the other should act for him in all matters connected with their partnership business. The acts of each are the acts of both, and neither is at liberty to disaffirm what the other does. In this matter, therefore, the act of E. Rhett may be considered as the act of Albert Rhett. If a plaintiff should write a letter of instruction to one of a law copartnership, directing the commencement *or prosecution of a suit, and the letter should come into the [*264 hands of the partner, who should commence the suit without consulting the one to whom the letter was directed, could the act be disaffirmed by either the principal or the other partner, unless it should appear that the power was specially and exclusively delegated to the one to whom the letter was addressed? Or if a man in the country should, by letter addressed to one of a firm in the brokerage or commission business, direct the purchase or sale of some article of property, could not another partner, in the absence of the one to whom the letter was addressed, effect the sale or purchase, so as to bind the principal ? It can hardly be denied the plaintiff would have been bound by the acts of Albert Rhett ; and by the very nature of a partnership, the acts of Edmund are the acts of Albert Rhett, by which he is as much bound as if he had acted himself. If, therefore, Mr. Edmund Rhett did authorize or affirm this sale, it seems to me the plaintiff is bound by it. I do not say he did any such act. I should rather conclude from the testimony, he did not ; but these are matters which should be passed on by the jury and as the presiding Judge in his view of the law thought them immaterial, a majority of this Court are of opinion a new trial should be granted, and it is so ordered.

BUTLER and WARDLAW, JJ., concurred.

RICHARDSON, J., *dissenting*.—The motion for a new trial depends upon this question, was the Judge correct in charging that the rights of Ann Beck could not be affected by the acts of Edmund Rhett ? It was assumed that Edmund Rhett had not been made her agent by the letter written to Albert Rhett, although Albert and Edmund Rhett were partners at law. This question is new, and requires consideration. The letter to Albert Rhett was in these words : "On the suggestion of Mr. Beck, I enclose a mortgage of some negroes of his to Miss Beck. My purpose is, to enable you to protect her interests from all Beck's creditors." This was the power of attorney. At the time of the sale, Albert Rhett did not even know of such a letter, and of course Edmund Rhett could not have acted with his privity. He must, then, have been a mere volunteer, *unless he could himself derive the rights of an [*265 agent from the letter to Albert Rhett, and had authority from it to ratify the sale of Richard which he had forbidden in the first instance.

But there are many objections to such a construction in favor of Edmund Rhett's agency :

1st. The authority was in writing, and confined to Albert Rhett ; and he, not even knowing of it, could not have accepted it. It follows that no one could have had the right to assume his agency, or acceptance, when neither existed.

2dly. It was a special agency under Mr. Williams, the general agent

of Ann Beck, and ought to be construed strictly and confined to the special agent named by the general agent. No one else ought to implicate him or his principal.

3d. It was an agency in fact, and not to an attorney at law to do professional business, in its terms to protect her interests from all Beck's creditors.

This could not give the power to sell or convey away the property. It was to protect and guard it from being sold at all, in order to protect her right and title to the negroes, or to interpose her prior claim to all creditors.

It is the same as if to protect her interests in a tract of land, or piece of furniture, which would be neither to sell nor destroy her title, but to protect it. This may be a very strict construction, but the agency had no more of a professional law character, than if it had been to pay her taxes, or to look to her interest in a consignment of goods, claimed by another person, or to superintend her plantation or negroes.

A lawyer acts often as an agent in fact; and the rule that the principal cannot be bound, unless by his own agent, acting within the authority delegated, must be preserved, else we infract the first principle of the law of principal and agent, and make one man bound by the acts of another, without his own consent.

It is upon this strict view, that I question whether Albert Rhett himself could have ratified the sale made by sheriff Rice, and kept within the special written agency of William's letter. How could such an act protect her interests? *But I feel clear that Edmund Rhett had no agency whatever. But assume, for a moment, that the power to sell the negro was given, and also, that the professional partner of Albert Rhett, although unknown to Ann Beck, became also her agent, by construction of law—this would be going very far by implication, assuredly.

*266]

But, shall we go further, and say that the two Rhetts were not only her agents, but her *joint* and *several* agent? Where can we find necessity or reason for this implication? If a stranger must be introduced by legal intendment, why go another step, and say such stranger may act without the advice, consent, or knowledge, or even before the acceptance of Albert Rhett, the only agent practically confided in and named by the principal? Should we not rather say, under any construction, that Edmund Rhett could be no more than united *jointly*, and not severally, with Albert Rhett, and, therefore, his several or individual acts could not affect the rights of Ann Beck? Under any other and further implication, she would be deprived of her rights by law, without her own consent, privity, or any confidence apparent from her letter of attorney to Albert Rhett.

The implication that operates so strongly, should be unavoidable, and from unquestionable premises, in order to force us to such a conclusion, by mere construction.

I need scarcely here do more than refer to the settled doctrine of joint agencies.

Judge Story on Agency, p. 44, sums up the doctrine, as made by adjudged cases, thus: "Where an authority is given to two or more persons to do an act, the act is valid to bind the principal only when one

of them concur in doing it. For the authority is construed strictly, and the power is understood to be joint, and not several," &c. "So," he continues, "if an authority is given to two persons jointly to sell the property of the principal, one of them cannot separately execute the authority." "Indeed, so strictly is the authority construed, that, if it be given to three persons jointly and severally, two cannot properly execute it; but it must be done by one or by all." "However, the rule of interpretation is not so rigid as to overcome the apparent intentions of the party, if the words can be so construed as to reach the case. Thus, if an *authority be given A. B., or either of them, a joint or several [*267
execution will be valid."

It is plain from this exposition, that powers to two or more persons, are strictly and always joint, unless literally or unquestionably several from their intent and necessity. There is very little room for constructive intendments in the law of agencies. But there is a caution in the doctrine in dealing with the rights of the absent, that is most wholesome, and in just accordance with that of the statute against frauds, to suffer no man to be made liable for another's debt or default, except upon his own written assumption. How *strictly joint*, then should be the agency of any man who is joined by implication to the named agent. Look into the facts of the case. Rice takes the letter to Albert Rhett from the post office, assumes the friendly liberty of opening it, and proceeds under the mortgage he found enclosed. The transaction reaches the ears of Edmund Rhett at the moment of the sale. He promptly forbids the sale as Albert Rhett is absent. But according to the witness Branch, he afterwards told the sheriff to tender the bill of sale and demand the money. The sheriff does so, delivers the negro, and keeps the money for his own security. But under the doctrine just laid down, I ask, in what one link in this series of gratuitous acts, is Ann Beck to be held as assenting or implicated? There can be no reproach to the purchaser whatever. He must stand a suit at law, that he may recover over against Rice. But his right of property depends upon the assent to the sale by Ann Beck, as indicated by her power of attorney, when united with such gratuitous acts of other persons. It is in those acts that I can perceive no influence to alter her right.

She seems as little implicated in the whole transaction, as if her agent, Williams, had never written the letter to Albert Rhett, who (Rhett) repudiated the sale the moment he heard of it, although he uttered no reproach against Rice for opening the letter. And I take occasion here to state, that I never witnessed a trial, notwithstanding its contradictions, in which all parties were more free from personal or any unpleasant allusions.

As a majority of the Court think differently from me, *my [*268
impressions of the power of attorney however strong must be mistaken. But as the point is new and peculiar I will add a word more, on the authority of decided cases. I can find none finally adjudged, so as to be of express authority. But in that of *Edmonston against Wright*, 1 Campbell, p. 88, we may find a decision of Lord Ellenborough, of some importance still.

Wright had negroes in Jamaica. Mr. Leeky, Edmondston's partner, was his attorney on record, who had the management of the negroes;

the negroes were shipped to Georgia by order. But the captain not having a permit, the negroes were forfeited. To release them, Edmondston paid £1,200, as a compensation, which he sought to recover against Wright. The question, it will be seen, was, whether the general powers of Lecky could be exercised by his partner, Edmondston. Lord Ellenborough ruled "that it was a voluntary payment," and held, that the plaintiff (Edmondston,) could possess no general authority as partner of Lecky, *whose powers as attorney on record, were clearly incommunicable;* and, as manager of the gang of negroes, he (E.) was "*functus officio,*" after delivering them on board the ship. Verdict for defendant. Now then, for the general agent, read Albert Rhett, and for his partner, Edmondston, read Edmund Rhett, and we may say, with the same reason, that Albert's powers were "clearly incommunicable" to Edmund; but communicate them and they are not still joint powers. But the case before us is stronger, because Albert Rhett could not physically or morally have communicated his powers, as he had not accepted and knew not of their existence, until after the sale, and after the supposed exercise of his agency by Edmund Rhett. But ought not the opposite side be required to show the authority for his claim to such an exception in the law of agency? And are we not then with too little reason, opening a new and wide way for the entrance of imputed agencies? And should we not do it at least with these qualifications, that it can only follow the acceptance by the named partner? And then we build joint, and not several agency. If so, the verdict for Ann Beck is right.

269*] And I must be allowed to repeat now, before Albert *Rhett personally accepted, and thereby created the agency to the co-partnership, no agency could arise.

Why such an agency belongs to the profession of the law, so as to be translated to Edmund Rhett, by the letter falling into his hands; or how, after it had been translated to him, it became in his hands both a *joint and several* agency, I cannot perceive.

In a word of common sense—how a series of liberties taken, and of trespasses done, by the sheriff, when afterwards interwoven with the hasty interference of Edmund Rhett, on account of the apparent agency of his brother, could divest the plaintiff of her rights, does not strike my understanding. Does not the gratuitous character in the beginning follow the transaction throughout, and keep the whole estranged from the plaintiffs? I would, therefore, support the verdict upon the established strict construction of agencies, and would not the less support it "*in odium spoliatoris;*" and so let the sheriff, who began and ended the trespass, respond in damages to the purchaser of the negro.

O'Neall, J., concurred with Richardson, J.

*M. BRAVEBOY *ads.* W. J. COCKFIELD. [*270

Where a prosecution against a party never legally existed, he cannot maintain an action for malicious prosecution.

Tried before Mr. Justice EARLE, at King's Tree, Fall Term, 1841, whose report of the case is as follows:

This was an action on the case for a malicious prosecution. On the information of the defendant, a warrant was issued by a magistrate for the arrest of the plaintiff. The information embodied in the warrant was, that "the plaintiff feloniously did take, steal, and carry off, his (defendant's) negro boy Tobe; and did, with force and violence, carry off his said boy, out of the said district." The plaintiff was arrested in Marion district, where the warrant was countersigned by another Justice. The warrant was issued on the 12th of August, 1839, and the plaintiff entered into recognizance on the next day. The defendant, in person, applied to the justice, and made his complaint, that his negro had been taken off while he was at meeting; and that he thought the persons he named, of whom defendant was one, had done it, and he wanted proper process against them. The justice thought it a case of felony. He read the affidavit to the defendant before he was sworn. He delivered the warrant, when issued, to the defendant and a constable, who went away with it. Defendant himself carried the warrant to the constable, Yarborough, who had it backed, (countersigned) and made the arrest in Marion. To several persons, after the warrant was taken out, the defendant said he did not believe plaintiff was actually concerned in the carrying away of the negro, but that he was along, and aided the Burketts, who were the other parties charged. The prosecution was abandoned at the first term; no bill was given out, and the plaintiff was discharged. A civil action was brought in Marion for the negro, which resulted in favor of the defendant. When the defendant delivered the warrant to Yarborough, and it was backed by Justice Askins, in Marion, he said he would not be in Cockfield's place for half he was worth. I refused a motion for nonsuit.

*It was proved on the defence, that the negro was carried off from the defendant's residence in August, 1839, in the day time, [*271 but privately, when the family were absent from home. The plaintiff came first to the house, and called Tobe with him to the fence, and inquired if his master was at home, and conversed with him some time; the plaintiff then rode along the fence, and called another of the negroes to him at the fence, and had some conversation with him. This occurred about twelve o'clock. The witness who proved these facts, with the wife of the defendant, then left the place; and in the afternoon of the same day, perhaps in an hour, the negro Tobe was carried off by two men, named Burkett, father and son. The defendant, who was at church in the neighborhood, was sent for, and the foregoing facts communicated to him. He went immediately to make his complaint to the justice; and it was proved by a witness sworn for the defence, that while he was at church, the plaintiff had been at his house, talking with the negro; that the Burketts had afterwards carried him away; and that the plaintiff had crossed the river with them. He left the matter mostly to the justice, and ex-

pressed his regret that the plaintiff, with whom he had always been friendly, should be charged with such a thing. He complained that his negro had been taken away, or stolen and carried off, and demanded redress according to the course of law; he wanted to recover him; but according to another witness, he said the plaintiff had aided the Burkett's, who had done it; that he had been seen there, &c. It was fully proved that the defendant soon became satisfied that the plaintiff should not have been included in the prosecution, or regretted that he had been; and he did what he could to atone for it. He excused himself on the ground that he was informed by his wife and sister, that the plaintiff had been at his house the same day, talking with Tobe, and that he had crossed the river with them the same day; and, therefore, he thought that the plaintiff knew of it. There was other proof also, that the Burketts had long before set up a claim to this, and other negroes, in possession of the defendant; had gone to his house to make a demand; and that he replied, that they
272] had no sort of claim, and forewarned them from attempting to take them. The defendant justified himself by saying he had the advice of two justices, who thought it stealing; but afterwards, on getting other advice, found he was wrong, and did all he could to stop the prosecution. I submitted the cause to the jury with ample instructions. I did not think there was probable cause for the prosecution, if Burkett had a *bona fide* claim to the negro, known to the defendant, and had taken him in the assertion of that claim. I submitted to them, if they found the affirmative of those propositions for the plaintiff, then he should have a verdict. If the claim of the Burketts had been a mere fraudulent pretence to seize the negro, so as to avoid the charge of felony, and they had carried him off beyond the reach of the defendant, there would have been good cause of prosecution against them; and I thought the proof would warrant the proceeding in that case against the plaintiff. I did not, in any view, consider it a case for heavy damages, and the jury found for the plaintiff twenty dollars.

From this verdict the defendant appeals, and moves that the same may be set aside, and a *nonsuit* ordered, on the following grounds:

1. That it appeared by the plaintiff's evidence, that he was never lawfully arrested, nor even for one instant detained, on the prosecution of the defendant.

2. That the defendant having stated to the magistrate the facts and circumstances on which his complaint was founded, which facts and circumstances the plaintiff did not attempt to disprove, or even deny, the magistrate, and not the illiterate defendant, is responsible for the institution of a prosecution for felony, if those facts and circumstances did not warrant such a prosecution.

3. That the plaintiff wholly failed to prove the want of probable cause; and all the evidence produced by him on that point, went directly to show the existence of sufficient reasonable and probable cause to justify a prosecution.

4. That there was no evidence whatever of malice; the existence of which was in fact wholly disproved by the plaintiff's own witnesses.

*273] *Should the motion for a nonsuit fail, the defendant then moves for a *new trial*, on the same grounds, all of which, so far as they depended on evidence, were incontrovertibly established by the evidence introduced on the part of the defendant; and the jury were bound to find in conformity to the law applicable to it.

And in support of the motion for a new trial, the defendant will rely upon the further ground, that the verdict was without evidence, against evidence, and contrary to law.

Bailey, for the motion. *Harllee*, contra.

Curia, per O'NEALL, J. I think the motion for nonsuit ought to have been granted on two grounds. 1st. There was no legal arrest of the present plaintiff, to answer the carge of negro stealing. If the warrant had been properly countersigned by Justice Askin, and the constable of Williamsburg had been duly authorized to execute it, I think it would have been sufficient. But the instrument preceding the justice's signature on the back, is anything else than countersigning or authority to execute the warrant. The words used are plain English, and must be understood according to their meaning. They give a license from Mr. Justice Askin to constable Yarborough, "to rest and remain" in Marion district. It may be, the words were intended to authorize an arrest and detention, but they certainly have no such appropriate meaning, and we have no right to give it to them, from the belief that they were ignorantly used.(*a*) Public officers using plain English words ought to be supposed to understand their meaning. The defendant and constable Yarborough may be liable for false imprisonment, in arresting the plaintiff without warrant; but the defendant cannot be liable in malicious prosecution, when the prosecution never legally existed. The plaintiff is not helped by the defendant's recognizance to prosecute, or the plaintiff's to appear and answer; neither of them are appropriately conditioned as papers on the criminal side of the Court, they apparently relate to a case between party and party.

2d. I think there was proof of "abundant probable *cause." To come understandingly to a just conclusion, it is necessary to [*274 understand what is probable cause. Any thing which will create in the mind of a reasonable man the belief that a felony existed, and that the party charged was in any way concerned in it, is probable cause. The mere letting fall a prosecution does not raise an implication of a want of probable cause. The only cases where that is implied, are when the grand jury find no bill, or the defendant is acquitted by the petit jury, and the presiding judge orders a copy of the indictment.(*b*) From the statement in the report, it would seem that the plaintiff relied on "the letting fall the prosecution" as evidence of want of probable cause. This was not enough. But we would not now nonsuit the plaintiff on this ground, if in the progress there was a semblance of a want of probable cause shown. But it was plain there was not. In the absence of the defendant, one of his negroes was taken privately out of his plantation, by men who pretended, but who in point of fact had no claim to him. The plaintiff was seen before the negro was taken off, talking privately to him, and afterwards to another. The same day he was seen crossing the river with the men who took the negro away. The defendant stated these facts to the justice, who thought the present plaintiff and the Burketts (who carried off the negro,) liable to the charge of negro stealing, and so advised the defendant. After this statement who would hesitate in saying that the defendant had reasonable ground to believe that the plaintiff had committed the felony with which he charged him? There is no dispute about these points. *They show plain probable cause*, and

(*a*) See 4 Strob., 208. *An.*

(*b*) See *Fulmer* vs. *Harman*, 3 Rich., 576. *Ford* vs. *Kelsey & Deas*, 4 Rich., 374. *An.*

hence the plaintiff must fail. If authority be necessary to sustain this view of the case, it will be found in *Fields* vs. *Gibbes*, decided by the Court of Appeals at Columbia, in May, 1837. (MS. *An.*)

The motion for a nonsuit is granted.

RICHARDSON and WARDLAW, JJ., concurred.

BUTLER, J., I am in favor of a new trial.

*275] *EVANS, J. I think there was a sufficient arrest; but that there was probable cause for the prosecution, and I concur on that ground.

JAMES L. ROSS, SHERIFF, *ads.* DAVID GAVIN, ET AL.

By the fee bill of 1840, the ten times the excess, which the officer is made liable to forfeit to the party injured, is "to be recovered by suit in the Court of Common Pleas, in which no imparlance shall be allowed; or by rule, in the case of sheriffs, or by sum. pro. in the cases of magistrates and constables, where the penalty may not exceed $20." By the fee bill of 1839, (of which that of 1840 is amendatory, so far as relate to sheriffs,) the ten times the excess is to be recovered by suit in the Court of Common Pleas, in which no imparlance shall be allowed, or by rule, when the penalty may not exceed twenty dollars. Putting these two acts together—it was held, that the qualification in the Act of 1840, when the penalty may not exceed $20, as applying to the rule in the case of sheriffs, and to the sum. pro. in the case of magistrates and constables.

Before RICHARDSON, J., at Walterboro', Fall Term, 1841.

The following opinion of the Appeal Court fully presents the history of the case.

Curia, per WARDLAW, J. The defendant, James L. Ross, seeks by rule to make the sheriff liable for ten times the amount of excess of fees improperly charged. No written order was entered on the Circuit; but the presiding Judge refused the order proposed to make the sheriff liable for ten times the excess, and expressed his opinion that he should be liable for the supposed excess of $32 79, and ten per cent. thereon; holdthat it was a matter of discretion to impose, by way of punishment, according to the circumstances, any penalty short of ten times the excess. The defendant asks his proposed order from this Court, and the whole *276] matter has been reviewed. Avoiding *any expression of opinion not now required, as to the question whether, in a fit case, discretion should be allowed as to the amount, or ten times the excess taken as a fixed penalty or forfeiture, this Court is not satisfied that fees have been improperly charged to the amount of the excess stated by the clerk; or that in any view it can take of the excess, the proceeding by rule is here correct.

Upon ten executions against the same defendant, fully paid to him, the Sheriff has charged in each case for his commissions two per cent. on the first $300, and one per cent. on the balance; the clerk, aggregating the whole collections, allows two per cent. on the first $300, and one per cent.

only on the entire balance. The clerk proceeds upon a literal construction of the words—"Commissions on all moneys collected by him." But these words as well embrace all moneys collected from all defendants, as all moneys collected in all cases against the same defendant; and if they are to be confined to moneys from the same defendant, stronger reasons both of construction and expediency would confine them to moneys in the same case. The fee bills, in their whole scope, where a contrary intendment does not plainly appear, necessarily contemplate the services of officers in a particular case; and instances are easily imagined of confusion and injustice from an attempt to group various cases. Commissions constitute the main compensation for the trouble and responsibility of the sheriff in receiving and paying away moneys, charging and discharging himself in his execution book, making calculations, applying moneys according to the rights of various plaintiffs, and taking receipts—and if the compensation, adjusted so as to afford an adequate remuneration in a case of small amount, and not an excessive one in a case of large amount, is to be reduced, because the defendant is unfortunate enough to have various executions against him, it should at least appear that by that circumstance the trouble or responsibility of the sheriff is diminished. Where the sheriff is to have refunded to him an outlay, as in the case of *State* vs. *Beckett*, (3 McCord, 290,) for printer's bill for advertising, or as in the present case, for keeping mules and dieting negroes, &c., it is reasonable and proper that money expended or labor bestowed in reference to the *subject rather than the case, being once paid should [*277
not be multiplied by construction; but such matters are easily distinguishable from the services expected to be performed in every case, and in reference to which the fee bill has prescribed such rates of charge as were supposed likely, in view of the probable number of cases, to afford a reasonable compensation to the officer.(*a*)

Many of the observations made as to commissions, apply to mileage, which the clerk allows but once, although charged by the sheriff on the levy of every execution. The words of the Fee Bill of 1840(*b*) are "levying attachment or execution, besides mileage, one dollar;" and in a previous part, "for serving every writ, &c., besides mileage, one dollar;" "mileage to defendant's or witness' residence, or place where found, going, but not returning, five cents per mile." The expressions indicate the propriety of the charge in each case. If mileage is to be charged but once, because but one ride was taken, although many writs carried, then an inquiry must be instituted of the number of writs carried by a sheriff at once, and the first mile divided between all, the second between those not served in the course of the first, and so on, until it can be ascertained how many remained to share the charge for the latter portion of the journey. If a levy be unnecessarily made on many executions, where one would have served, a question, different from that now under consideration, might be presented.

Striking from the excess, ascertained by the clerk, all that relates to commissions and mileage, the balance would be $6 75; and as to the defendant's right to claim ten times that reduced excess, the Court is of opinion that it cannot be investigated on *rule*. By the Fee Bill of

(*a*) See 2 Rich., 23. *An.* (*b*) 11 Stat., 104, § 2. *An.*

1840, the ten times the excess, which the officer is made liable to forfeit to the party injured, is "to be recovered by suit in the Court of Common Pleas, in which no imparlance shall be allowed; or by rule, in the case of sheriffs, or by summary process, in the cases of Magistrates or Constables, where the penalty may not exceed twenty dollars." By the Fee Bill of 1839,(*a*) (of which that of 1840(*b*) was amendatory, so far as concerns sheriffs,) the ten times the excess "is to be recovered by suit
*278] in the Court of Common Pleas, in which *no imparlance shall be allowed, or by rule, when the penalty may not exceed twenty dollars." Putting these acts together, this Court regards the qualification in the Act of 1840, "when the penalty may not exceed twenty dollars," as applying both to the "rule in the case of sheriffs," and to the "summary process in the cases of Magistrates or Constables." The provision as to Magistrates Constables seems to have been introduced, in a sort of parenthesis, because only the Act of 1840 spoke of those officers whose small fees, increased ten fold, might not sometimes exceed twenty dollars, and without such provision it might have been supposed that the Court of Common Pleas could not take cognizance of a case below twenty dollars, and so within the exclusive jurisdiction of Magistrates. As to sheriffs, no reason could have existed why the summary proceeding by rule, held in 1839 inapplicable, where the amount exceeded twenty dollars, should in 1840 be extended to an indefinite amount. There is much propriety, in reference to our constitution, and the rights of the citizen, in holding that a highly penal provision should not, above that sum as to which the right of trial by jury has ordinarily been heretofore preserved, be enforced by a proceeding which is peculiarly arbitrary and severe.

The rule against the sheriff, H. W. Rice, is therefore discharged.

RICHARDSON, O'NEALL, EVANS and BUTLER, JJ., concurred.

Edwards, for the motion. *Carn*, contra.

See 2 Strob., 388. *An.*

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*279] *C. M. CREIGER *et ux. vs.* BENJ. J. SMITH.(*c*)

Where an action of assumpsit has been brought in the name of the husband and wife, and the declaration alleges the promise to have been made to the husband and wife jointly—without stating the interest of the wife, or any reason why she was joined. It was held a good ground in arrest of judgment, and the verdict of the jury did not cure the defect.

Before WARDLAW, J., at Gillisonvile, January, Extra Court, 1841.

The circumstances that gave rise to this case, will be fully understood from the argument and the opinion of the Court, without any further detail.

(*a*) 11 Stat., 11, § 2. *An.* (*b*) 11 Stat., 106, § 8. *An.*
(*c*) S. C. Supra, 140. *An.*

WARDLAW, J.—The declaration in assumpsit alleges the promise to have been made to the husband and wife jointly, without any statement of the wife's interests, or any reason shown why she should have been joined. The defect is plainly one which is not cured by the verdict, and which is fatal upon motion in arrest of judgment. 1 Chit. Pl. 20; 2 Wm. Bla. 1236; 2 Caines' Rep. 221; 2 Bur. 170.

The plaintiff's counsel, opposing a technical objection on his part to the technical exception now taken to what he considers a very meritorious recovery of the plaintiff's, has insisted that this motion should be overruled, because there is a defect in the office copy, which the appellant has produced under the 81st rule of Court, which requires that the appellant *relying on an exception to the record*, shall procure and bring up an office copy. The office copy here produced, contains the declaration, plea, similiter and verdict, and is said to be defective, because the notice of a discount which was offered is not contained in it.

If it appeared that the omission made by the officer might keep from view any thing that could influence the decision, it is probable that the Court would give time for remedying the defect, rather than dismiss the appeal. But it is not even alleged that there was any thing peculiar in the notice of discount, or that it could have caused the defect in the declaration; and it would be extreme severity to reject an office copy, which presents all that is necessary for understanding the motion, because something immaterial is omitted. If the notice of discount be essential, why not *also the writ, the sheriff's return, and the [*280 venire? The office copy required by the rule is not a perfect exemplification. In the common parlance of the profession, the pleadings are called the record, although in absolute strictness it may be untechnical to call them so, whilst they remain *in paper* before entry of judgment. The appellant here has produced all that either party could have occasion to refer to, and has obeyed the rule, according to the usual practice of the Court.

The motion is granted.

RICHARDSON, O'NEALL, EVANS, BUTLER, and EARLE, JJ., concurred.

W. F. Hutson, for the motion, argued—in all cases, if the wife be jointed in the action, her interest must be expressly stated in the declaration, and cannot be intended. 1 Chit. Pl., 20; C., 20. Jac., 644. 2 Caines Rep., 221; 2 Black., 1236; 1 Bar., 75, 249. But it may be objected, that the husband had a right to bring the action alone. This does not avail. See 1 Chitty, 19 and 20. It is not too late too move in arrest of judgment, though the plaintiff might have demurred. *Bidgood* vs. *Way and wife*, 2 Black., 1236; *Abbott & Blofield*, Cro. Jac., 644; *Holmes & Wood*, 1 Bar., 75 and 249; *Venters* vs. *England and wife*, 1 M'C., 14; *Chapman and wife* vs. *Hardy and wife*, Brev. Rep. S. P., 1 M'C., 578.

E. and *A. Rhett*, contra.

*281] *A. J. PYRON ET UX. *vs.* EDWARD MOOD.(*a*)

Where there has been a post-nuptial agreement, between two parties, and a deed of trust is executed (to a third party as trustee), of certain slaves, for the use and benefit of both husband wife, during life, upon the death of either, to the the use of the survivor, and after the death of both, to the use of the children of the marriage, with a power to sell and reinvest, at the request of husband and wife, or the survivor of them; and after the death of the wife, the trustee, at the request of the husband, sold the slaves and conveyed them to the defendant. It was held, that the purchaser's title was good. That the trustee had not only the legal estate in the property, but he had the power to sell, and at law, the title could not be disputed.

Before BUTLER, J., Charleston, January Term, 1841, whose report of the facts of this case is as follows:

This was an action of trover for five negroes. The plaintiff, Pryon, married one of the daughters of Charles and Rachel Simons, and he, with the other minor children of the same parents, bring the action against the defendant, who bought the negroes in question from Peter Redheimer, the trustee of Rachel and Charles Simons, in their lifetime. and as the case will turn on the right of Redheimer to sell, under certain deeds of trust, it will be necessary to advert to them, and the circumstances under which they were executed. Charles Simmons married the sister of Redheimer, his habits became intemperate, so much so as to excite the fears of his friends that he would waste his property and leave his family destitute; and with a view of securing the property which he had, for the use of himself and his wife during life, and after their death to their children, he and his wife executed a deed of trust to Redheimer. This deed was executed 8th October, 1829. After reciting the objects for which it was made, and describing the property conveyed, part of which was the negroes in controversy, it contains the following clause, to wit, to have and to hold, and so forth, "in trust to permit and suffer the said Charles and Rachel Simons to have, use, occupy and enjoy the above granted premises, and to receive the interest, income and emoluments arising therefrom, for and during the joint natural lives of them, the said Charles and Rachel, without being subject and liable to the debts, &c., of the said Charles and Rachel; and from and immediately after the death of either of them, the said Charles and Rachel, then in trust to permit and suffer
*282] *the survivor of them, the said Charles and Rachel, to have, use, occupy and enjoy the above granted premises, and to receive the interest, income and emoluments arising therefrom, for and during the life of said survivor; and from and immediately after the death of such survivor, then in trust, to and for the use, benefit and behoof of the issue of said marriage, if more than one, as tenants in common and not as joint tenants, their heirs, executors, administrators and assigns; and if but one, to that one, his or her heirs, executors, administrators or assigns, free, clear and absolutely discharged of and from all and any further trusts whatsoever." The above property continued in the possession of Charles and Rachel till the death of Rachel, who died 26th October, 1836, and her husband, Charles, died November 9th, ensuing. He was

(*a*) Examined, perhaps overruled, in *Rice* ads. *Burnett*, Sp. Eq., 589, 591. *An.*

found dead, with a bottle that had some spirits in it, and a bottle of laudanum. An inquest was held over the body: verdict that the deceased came to his death by drinking ardent spirits and taking laudanum. With a view to show that Redheimer sold the property now in controversy, before the death of Charles Simons, the survivor, and of course with his consent, the plaintiff offered in evidence the bill of sale from Redheimer to the defendant, and which he contended bore date 2d March, 1837, and that it had been fraudulently ante-dated to 2d November past, and in the *sixtieth* year of American Independence—the word *sixty-first* having been erased and sixty inserted. This is noticed by memorandum above the name of the witness Carson, who was not present when the paper was given in evidence. He was sent for, and being sworn, said that the bill of sale bore its true date, and that he was certain it was executed in thirty-six and not thirty-seven, and he said he had no doubt that it was executed in good faith and in conformity with the express understanding of the parties, Charles Simons and Redheimer. Here it appeared that Redheimer had the children of said Rachel and Charles, and was educating and supporting them. Mr. Carson said it was understood these negroes were unproductive, and was sold for the purpose of having their proceeds invested in other productive property.

It will be seen, if the deed bore its true date, it was executed seven days before the death of Simons, and that it *was so executed, I have no doubt. For the purpose of showing that Charles Simons, the survivor, had given his assent to the sale of this, as well as other property contained in the deed of October, 1829, the defendant offered in evidence a deed, bearing date 29th October, 1836, executed by Charles Simons to Redheimer. This deed, after many recitals and explanations of its objects and designs, contains this clause: "And whereas, most of the negroes are young and unable to work, producing no income to the estate, this conveyance is therefore made to the said Redheimer, that he will sell any or all of said negroes at the best market price, and invest the proceeds (after paying the said debts and funeral expenses of the said Rachel Simons) in other property that will be more for the benefit of the said children, and in trust that the said Peter Redheimer will take the said children in charge, and have them educated, &c., out of the income arising out of said trust estate," (See deed.) [*283

This, it was contended, referred to and was in conformity with the last clause in the deed of 1829, which is as follows:—"And lastly, it is hereby covenanted and agreed between the said Charles and Rachel Simons, and Peter Redheimer, that at any time when it shall appear beneficial, or for the interest of the said Charles or Rachel, to sell or dispose of any of the above mentioned property, that the said Peter will sell and dispose of the same, at the joint request, or at the request of the survivor of them, and vest the proceeds in other property, which shall be immediately subject to the operation of all the uses and trusts expressed in this indenture."

I will not here undertake to give the reasons of my judgment below, on the construction of the deeds and clauses of deeds which affected the rights of the parties concerned.

I held, that by the deed of October, 1829, Redheimer had the legal title in him, and that it continued in him until the death of Charles Si-

mons; or, to state the converse of the proposition—that the trust was not executed in Simons and wife, during their joint life, or in the survivor. The true object of the deeds being to deprive Charles Simons
*284] of any control of the property at any time, *to the prejudice of his wife and children. After the death of his wife, Charles surrenders his interest to the trustee during his life, for the purpose of maintaining the children, and gives an express authority to sell and invest, &c., for the purpose of effecting the true end of the trust. The whole question was, whether the title was made to defendant while Redheimer was trustee, for, if so, the title would be good in a Court of law. Another question, however, was submitted to the jury, viz.: did Simons assent to the sale to defendant in his lifetime, or was the sale, in fact, made without his assent and after his death? This was the question mainly argued, and upon it, the jury found for the defendant.

DEED OF 8TH OCTOBER, 1829.

State of South Carolina.

This indenture made the eighth day of October, in the year of our Lord one thousand, eight hundred and twenty-nine, between Charles Simons and Rachel Simons, of the city and district of Charleston, and State aforesaid, of the one part, and Peter Redheimer, also of the said City and State aforesaid, of the other part. Whereas, in consequence of the intermarriage of the said Charles Simons with his wife, Rachel Simons, he became, in right of his said wife, possessed of and entitled unto the following property hereinafter mentioned. And whereas, the said Charles Simons and Rachel Simons are desirous, from the love and affection they and each of them bear unto their children, Charles John Simons, Eliza Ann Simons, Sarah Christina Myrick Simons, and all the future issue of the said Rachel Simons, lawfully begotten by the said Charles Simons, to settle upon them the following property, they became so possessed of and entitled unto by their said marriage aforesaid. Now, therefore, this indenture witnesseth that the said Charles and Rachel Simons, for and in consideration of the natural love and affection which they have for their children now got, and such other or others as may be gotten, and also in consideration of the sum of five dollars to them, the said Charles and Rachel Simons, in hand paid, at and before the sealing and delivery of these presents, by
*285] the said Peter Redheimer, the receipt whereof is hereby *acknowleged, hath given, granted, bargained and sold, and by these presents doth give, grant, bargain and sell to said Peter Redheimer, in actual possession now being by virtue of these presents, his heirs, executors, administrators and assigns, the following property, to wit: Three negro slaves, named Polly, Hannah and Thomas; also, one pair of mahogany card tables, one mahogany work table, one large mahogany dining table, two dozen sitting chairs, one carpet, two plain brass dogs, with fender, shovel and tongs, tea tables, cradle, two bedsteads and bedding, three feather beds, one mattrass, one chest of drawers, bed clothes, curtains and bed-room furniture, and mahogany side-board, tea and dinner set of China, one safe, together with kitchen furniture; also, with the future issue of the above mentioned slaves, and increase of such as are females. To have and to hold the said recited property, with the future issue and increase of the above named female slaves, unto the said Peter Redheimer, his heirs, executors, administrators and assigns; subject, nevertheless, to such trusts, and to and for such uses, intents and purposes, as are hereinafter limited, declared and expressed, of and concerning the same. That is to say, in trust, to permit and suffer the said Charles, and Rachel Simons, his wife, to have, use, occupy and enjoy the above granted premises, or to receive the interest, income and emoluments arising therefrom, *for and during the joint natural lives of them, the said Charles and Rachel Simons, his wife, without being subject or liable to the debts, control or engagements of the said Charles, and Rachel Simons, his wife; and from and immediately after the death of either of them, the said Charles and Rachel Simons, then in trust, to permit and suffer the survivor of them, the said Charles and Rachel Simons, to have, use, occupy and enjoy the above granted premises, or to receive*

*the interest, income and emoluments arising therefrom, for and during the life of such survivor; and from and immediately after the death of such survivor, then in trust to and for the use, benefit and behoof of the issue of the said marriage, if more than one, as tenants in common, and not as joint tenants, their heirs, executors, administrators and assigns; and if but one, to that one, and his or her heirs, executors, administrators and assigns, free, clear and absolutely discharged of and from all and any *further* [*286 trusts whatsoever. And lastly, it is hereby covenanted and agreed, by and between the said Charles and Rachel Simons, and Peter Redheimer, that at any time when it shall appear beneficial, or for the interest of the said Charles and Rachel Simons, to sell or dispose of any of the above mentioned property, that he, the said Peter Redheimer, will sell and dispose of the same at their joint request, or at the request of the survivor of them, and vest the proceeds in other property, which shall be immediately subject to the operation of all the trusts and uses expressed and declared in this indenture.* In witness whereof, the parties to these presents have hereunto subscribed their signatures and affixed their seals, at Charleston, So. Ca., the district aforesaid, the day and year first above written, and in the fifty-third year of American Independence.

CHARLES SIMONS, [L. S.]
R. SIMONS, [L. S.]
PETER REDHEIMER, *Trustee.* [L. S.]

Signed, sealed and delivered, in the presence of us. The words, "and if but one, to that one, and his or her heirs, executors, administrators and assigns," being first interlined above the seventh line, on the opposite side.

JOHN RIVERS,
HARRIET A. REDHEIMER, } *Witnesses for Simons.*
THOMAS E. DEVEAUX,
MATHEW MUGGRIDGE, } *For Trustee.*

South Carolina, Charleston District.

Thomas E. Deveaux, being duly sworn, made oath that he was present, and saw Charles Simons, R. Simons, and *Peter Redheimer, trustee, sign, seal [*287 and deliver this instrument of writing, for the uses and purposes therein mentioned, and that he, with John Rivers, Harriet A. Redheimer, and Matthew Muggridge, witnessed the same.

Sworn to, before me, this 9th October, 1829. Recorded 9th October, 1829.
WM. ED. HAYNE, Qu. & N. P.

Secretary of State's office, Charleston, So. Ca., Dec. 29th, 1841.

The foregoing is a correct copy of record in this office, in Miscellaneous record book, H. H. H. H. H., pages 413, 414. Examined and certified by

THOMAS S. JONES,
Dep. Sec'ty State.

DEED OF 29TH OCTOBER, 1836.

State of South Carolina, Charleston District.

Know all men, by these presents, that I, Charles Simons, of the District and State aforesaid, in consideration of the love and affection I bear my son, Charles John Simons, my daughter Sarah Christina Myrick Simons, my daughter Harriet Ann Simons, and my infant son, James Peter Simons, all born of my wife, Rachel Simons, and also in consideration of the sum of one dollar to me in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby alienate, transfer, convey and release all my right, title and interest in and to the following slaves, namely, Polly, Hannah, Thomas, *Billy*, John, James, Sarah and Robert, together with the future issue and increase of the females, unto Peter Redheimer, in trust, nevertheless, and to and for the proper use and behoof of my aforesaid children, Charles, John, Sarah Christina Myrick, Harriet Ann and James Peter, all minors, (the eldest being in her twelfth year, and the youngest in his second year,) or the survivor or survivors of them, should one or more of my said children die without issue and before coming of

age, and to his, her or their lawful heirs forever. Whereas, by a certain indenture or deed of trust, made and executed at Charleston, in the District and State
*288] aforesaid, on the eighth *day of October, one thousand eight hundred and twenty-nine, by the said Charles Simons and the said Rachel Simons, his wife, three of the said slaves, namely, Polly Hannah and Thomas, were duly conveyed to the said Peter Redheimer, in trust for the children of the said Charles and Rachel Simons, then alive, namely, Charles, John, Eliza Ann, and Sarah Christina Myrick Simons, but Eliza Ann having died, and the infant child, James Peter, in this deed mentioned, having been born after and since the date of the aforesaid deed of trust, and the said Charles Simons, by and with the consent of his said wife, Rachel, (since dead,) in her lifetime obtained, wishing to release and convey unto the said Peter Redheimer, in trust as aforesaid, *the life estate of* him, the said Charles Simons, in said deed of trust reserved, he, the said Charles Simons, hereby releases and conveys the *said life estate*, with all other rights, titles and interests in the said three slaves, *and the issue of the females*, from and after the date of the said deed of conveyance, unto the said Peter Redheimer, his executors and administrators, to *and for the trust, uses and purposes aforesaid*. And whereas, two of the negroes in said deed of trust conveyed, namely, Polly and her child Thomas, have been, since the date of said deed, sold and delivered to for and during the lifetime of the said Charles and Rachel Simons, according to the reservation in said deed, whereby the remainder alone can vest in the said Peter Redheimer, trustee as aforesaid. Now, the said *Charles Simons ratifies and confirms said remainder in said trustee, vested by virtue of the aforesaid indenture* or deeds of trust. And whereas, the slave Billy herein conveyed, has been purchased by the proceeds of the sale of *the said life estate of* the two negroes, Polly and her child Thomas, by him the said Charles Simons sold and delivered for the term aforesaid.

Now, the said Charles Simons, for the above consideration, hereby sells, transfers and conveys the said slave Billy, (being one of those above conveyed generally) unto the said Peter Redheimer, trustee as aforesaid, to and for the *uses and purposes aforesaid*. And whereas, all the slaves and other property in said deed of trust conveyed, came into the possession and ownership of the said Charles
*289] *Simons by his marriage with his wife Rachel. In consideration of which, (with the considerations above mentioned,) he makes *and ratifies this deed to secure the said estate to the issue of her body*. And whereas, certain articles of household furniture in said deed conveyed and specified, have been, since the date thereof, sold and delivered in part, and other articles purchased. Now, the said Charles Simons hereby sells, conveys and releases *all his right*, title and interest, to as many of the said articles as remain in his possession, (an inventory of which is hereunto annexed) unto the said Peter Redheimer, trustee as aforesaid, for the uses and purposes above mentioned.

And whereas, the said Charles Simons has contracted certain debts, to the amount of about three hundred dollars, which he requires to be paid out of the proceeds of the said estate by the said Peter Redheimer, trustee, as aforesaid: and the said Peter Redheimer, on his part, undertakes the said payment, on the terms of this deed being fully complied with. And whereas, most of the said negroes are young and unable to work, producing no revenue to the estate, this conveyance is therefore made to the said Peter Redheimer, that he will sell any or all of the said negroes, at the best market price, and invest the nett proceeds, (after paying the said debts, and the funeral and other expenses of the said Rachel Simons,) in other property that will be more for the *benefit of the said children*; and in trust that he, the said Peter Redheimer, will take the said children in charge, and have them educated, as far as possible, out of the interest or revenue arising from the said trust estate. But should it become necessary for the said trustee to take a part or all of the said capital, for paying the maintenance, education and other expenses of the said children, he is hereby enjoined, and it is the true intent and meaning of these presents, that he, the said trustee, shall not pay away, for or on account of any one of the said heirs, more than his or her dividend of said principal. And in trust, that the said Peter Redheimer shall use all due economy in the management of the said estate, and cause to be educated and maintained each of the said minors, according to the best of his judg-

ment, and agreeably to the means placed in his hands for that purpose. To have and *to hold the said slaves and other property herein conveyed unto the [*290
the said Peter Redheimer, his executors and administrators, to and for the use and purposes hereinbefore described, to wit, for the use of said *minors*, Charles Simons, Sarah Christina Myrick Simons, Harriet Ann Simons, and James Peter Simons, the survivor or survivors of them as aforesaid, and in trust that the said Peter Redheimer shall pay over to each of the said heirs, or the survivor or survivors of them, his, her or their portion or dividend of the said trust estate, should any remain after deducting all the aforesaid debts and expenses of maintenance and education. In witness whereof, the said Charles Simons, in execution and ratification of the above deed of conveyance in trust, and the said Peter Redheimer in acceptance of the said trust, have hereunto set their hands and seals, this twenty-ninth day of October, one thousand eight and thirty-six and in the sixty-first year of American Independence.

CHARLES SIMONS, [L. S.]
PETER REDHEIMER, [L. S.]

In the presence of
THOMAS W. MALONE,
E. THAYER.

The words "shall pay over" being interlined above the fourteenth line from bottom, and the name of "Harriet Ann Simons," being interlined after "Sarah Christina Myrick Simons," between the fourth and fifth lines, fourth, sixth and seventh, from top, and between the fifteenth and sixteenth lines from the bottom.

SOUTH CAROLINA.

Thomas W. Malone appeared, and made oath that he saw Charles Simons and Peter Redheimer sign, seal and execute this instrument of writing, and that he, with E. Thayer, witnessed the same.

*Sworn to, before me, this 31st October, 1836. [*291

JAMES KINGMAN, *Notary Public.*

South Carolina, Charleston district.

Inventory of all the articles of household furniture in the within deed, conveyed to Peter Redheimer, in trust, as therein specified, and this day put in his possession, according to his own acknowledgment, viz.: one side-board, one table, one mahogany bedstead, one mahogany cradle, one fender with dog-irons, and some articles of kitchen furniture.

Charleston, 29th October, 1836.

I acknowledge the receipt of the above articles.

PETER REDHEIMER.

In the presence of THOMAS W. MALONE.
Recorded, October 31, 1836.

Secretary of State's Office, Charleston, So. Ca., December 13th, 1841.

The foregoing is a correct copy, taken from record, in the office, in Miscellaneous record book, R. R. R. R., pages, 284, 285, 286, 287, the word "charges" erased on the fourteenth line from top of third page. Examined and certified by

THOMAS S. JONES,
Dep. Secretary of State.

BILL OF SALE.

The State of South Carolina.

Know all men by these presents, That I, Peter Redheimer, trustee for the minor children of Charles Simons, for and in consideration of the sum of sixteen hundred dollars, to me in hand paid, at and before the sealing and delivery of these

presents, by Edward M. Mood, (the receipt whereof I do hereby acknowledge,) have bargained and sold, and by these presents do bargain, sell and deliver to the said Edward M. Mood, Hannah, John, Jim, Sally, Robert, to have and to hold the said slaves, with the future issue of the females, unto the said Edward M. Mood, his executors, administrators and assigns, to his and their only proper use and behoof, forever. And I, the said Peter Redheimer, as aforesaid, my execu-
*292] tors and administrators, *the said bargained premises, unto the said Edward M. Mood, his executors and administrators and assigns, from and against all persons shall and will warrant, and forever defend, by these presents. In witness whereof, I have hereunto set my hand and seal, dated at Charleston, on the seventh day of November, in the year of our Lord one thousand eight hundred and thirty-six[illegible]n, and in the [illegible] sixtieth year of the Independence of the United States of America.

PETER REDHEIMER, [L. S.]
Trustee for the minor children of Charles Simons.

Signed, sealed and delivered in presence of,
ELISHA CARSON.

The words "sixty-first" being first erased.

I hereby guaranty this bill of sale to be good, and free from all claims whatever, unto Edward M. Mood, his heirs, executors, administrators or assigns, forever.

Witness, THOMAS N. GADSDEN.

2[illegible], 8[illegible]
March 2nd, 1837. } PETER REDHEIMER.

SOUTH CAROLINA.

Thomas N. Gadsden appeared and made oath, that he saw Peter Redheimer sign and execute the above guaranty and that he witnessed the same.

Sworn to before me, this 6th March, 1837.

JAMES KINGMAN, *Not. Pub.*

SOUTH CAROLINA.

Elisha Carson appeared and made oath, that he saw Peter Redheimer, trustee for the minor children of Charles Simons, sign, seal and execute the within bill of sale, and that he witnessed the same.

Sworn to before me, this 6th March, 1837.

JAMES KINGMAN, *Not. Pub.*

*293] *GROUNDS OF APPEAL.

1. Because by the terms of the deed of 8th October, 1829, from Charles Simons and Rachel his wife, to Peter Redheimer, the trust was *executed* in them during their joint lives, until the 26th October, 1836, when Mrs. Simons died—executed in Charles Simons, the survivor, after that date for life, until his death on 9th November, 1836, and after that event, the legal estate became vested in the plaintiffs, the children of the marriage.

2. Because the power to sell by Redheimer, contained in the above deed, even if it could exist independent of the execution of the trust in Simons and wife at all, was a naked power, uncoupled with an interest, requiring the express joint assent of Simons and wife, if alive, and the assent of the survivor of these tenants for life, and that deed never contemplated a sale after the death of Simons. Any sale not contemplated before his death, by delivery and express assent, was not within the terms of the power, even if the personal power existed apart from the legal estate.

3. Because the deed of Charles Simons to Peter Redheimer, dated 29th October, 1836, is inoperative, as far as it attempts to divest the legal rights of the minor children, which had accrued under the first deed of 8th October, 1829, and to permit it to be evidence of an express act of assent to the sale to the defendant Mood, is in effect to give it a legal operation.

4. Because the sale to Edward M. Mood is not mentioned in the deed of 29th October, 1836, and therefore, this deed is no evidence of assent to that

sale. The assent of a *cestui que trust*, to a sale by his trustee, must be a specific act, not a matter of implication. The execution of the power, and the act of assent, must be one contemporaneous transaction.

5. Because the deed of 29th October, 1836, was a fraud on the first deed, and could not operate to destroy the rights vested under the first, either by an actual conveyance of those rights, or an enlargement of the power to sell.

6. Because the deed of 29th October, 1836, is not only *fraudulent, but void for uncertainty and inconsistency, or if it can have a legal operation, [*294 confirms the rights vested in the minor children under the first deed.

7. Because Simons did not know of the sale to Mood, and therefore, as matter of fact, never assented to that sale. He died the day before the bill of sale was purported to be executed, and was no party to it.

8. Because the bill of sale executed by Redheimer, in possession of Mood, was on its face ante-dated, so as to be embraced within the period prior to the death of Simons, and a material alteration, or erasure, in a deed, is presumed to have been done by the party in possession, and the question of fraud was one of fact which should have been submitted to the jury.

9. Because Mood's title was a fraud, legally and morally, in law and in fact, on the vested rights of the minor children under the first deed, covered by the pretence of the execution of a power.

10. Because the delivery of the deed of sale with the guaranty from Redheimer to Mood, took place in March, 1837, as is evident on its whole face. The delivery of the deed of sale, and the guaranty endorsed on it, were simultaneous acts, and the guaranty is dated in March, 1837. The sale was for cash. The guaranty was required before the money was paid. The whole transaction intended to be in execution of the power, took place in March, 1837, when no power to sell existed, and no assent could be given.

11. Because the transaction, independent of its being a moral fraud, was one practiced by a trustee on his *cestui que trusts*, with a view to sell their property by the fraudulent execution of a power, and without the intervention of the Court of Equity.

12. Because Mood, the defendant, was a purchaser with notice of the fraud, and of the rights which were defrauded.

13. Because his Honor told the jury to find a verdict for the defendants on the facts.

14. Because the verdict was against the whole law and the facts of the case.

**Curia per* O'NEALL, J. The argument in this case has been [*295 rested on the ground, that the legal estate of the trustee was divested, and the trust fully executed, and, therefore, his conveyance was inoperative. There seems to me to be some very mistaken views of our decisions prevalent at the bar. They perhaps arise from all the decisions not being yet reported; and possibly from general expressions contained in some of the opinions delivered by myself. I know no better mode of putting the matter in a proper point of view, than first, by giving an extract from my opinion delivered in 1832, in the case of *Porcher* vs. *Gist*, which had the concurrence of JOHNSON and HARPER, the other Judges of the Court of Appeals, and then recur to the cases of *Pringle* vs. *Allen*, and *Ford* vs. *Caldwell*, and place them in their proper points of view.

In *Porcher* vs. *Gist*,(*a*) one of the questions made in the Court of Equity, was, whether, under an ante-nuptial settlement, conveying to trustees, for the joint use of husband and wife for life, after the death of either to the use of the survivor, and after the death of the survivor, to the use of the issue of the marriage, personal estate in the possession of

(*a*) MS., Charleston, 1832. *An.*

the wife was liable to be seized in execution for her debts contracted after she was discovert? In reference to that question it was said, "it is true, *the statute of uses applies altogether to trust in land*, and that makes one distinction between trusts of real and personal estate. In the former, if the trust is not executory, or if it is not necessary to preserve the trust, that the legal estate should remain in the trustee, the statute executes the trust so soon as the deed is executed, and the legal estate vests in *cestui que* use. In personal estate, the legal estate remains in the trustee, *until he executes the trust by delivering the possession to one capable of holding in himself or herself, a legal estate in property to the extent of the interest intended by the deed to be conferred.* If the estate is to the use of a married woman, the legal estate remains in the trustee, during her coverture, for she is incapable of herself to hold a legal estate in personalty in possession, which would not vest in the husband. An estate to the joint use of husband and wife during life, may, in order to preserve the trust, not be executed by the delivery of the possession to *296] *the husband. But after a *feme* is discovert, the reason no longer exists, why the trust should not be regarded *as executed to the extent of the estate intended to be conferred on her.*" In *Pringle* vs. *Allen*, 1 Hill's C. R. 135, the same question, under similar circumstances, was presented to the Court of Appeals, and received from the Court the same answer which was given in *Porcher* vs. *Gist*. A trust in personalty, is a mere bailment, and looking to the law on that subject, the whole difficulty is removed. The bailor has a general property, the bailee a qualified one. So a trustee and *cestui que* trust in personalty, the trustee has a general property, and the *cestui que* trust, the qualified property; and when to his qualified right of property, possession is added, it is complete to the extent of the interest carved out by the deed. Both are legal estates, and either might maintain trover for the conversion of the chattel by a stranger, as was decided in *Watson* vs. *Pitts*,(*a*) at Columbia, May, 1831. This explanation will, I hope, make the principle on which the Court has proceeded palpable. In *Ford, trustee*, vs. *Caldwell*,(*b*) the deed *there*, as that *here*, was post-nuptial, and conveyed to the joint use of husband and wife for life, not subject to their debts, and after the death of either, to the use of the survivor for life, and after the death of the survivor, to the use of the children of the marriage. From the words of the deed it was plain, that the actual possession of the *cestui que* trust of the slaves, was to accompany the trusts. The deed was made by the husband, he and his wife were alive, and he had conveyed the slave to the defendant's intestate. Speaking of that state of facts, 3 Hill, 249, I said, "I hold the trust was executed in the husband, at least for his life. For according to the deed, he was entitled to the possession of the slave; having *this*, he had both the legal and equitable estate for his life. For the trustee had nothing to do with it *during this time;* he had *delivered the slave to one* who was under no legal disabilty; this was equivalent to a conveyance to him for the time he was to possess it. For the condition annexed to the trust, not to be subject to the debts or contracts of husband and wife, is void. The husband, having both the legal and equitable estate, could transfer it, which

(*a*) Infra, 249. *An.* (*b*) 3 Hill. 248. *An.*

he did." These observations, when read in connection* with the case, are readily understood. They are the views of a *Law Court,* [*297 applied to the facts before them. The general property was in Ford, trustee; but he parted with the right to possess it to the *cestui que* trusts, Swift and wife, for life. At law the wife's being and rights are merged in the husband, and hence his possession for the joint use of himself and wife for life, made the property, for that time, his entire qualified legal estate, which he conveyed to Chur, and which the trustee *at law* could not dispute. In equity, if the purchaser had notice of the trusts, the rights of the wife *might possibly* be protected.

These explanations are made to place this interesting subject in its proper point of view. In the case before us, there is really no difficulty. *It is, in point of fact, a suit at law, for a supposed breach of trust, in a sale made by a trustee.* The redress of this injury, (if there is any,) belongs to another forum. The conveyance here, was to the joint use of the husband and wife for life, upon the death of either, to the use of the survivor, and after the death of both, to the use of the children of the marriage, with a power to sell and reinvest, at the request of husband and wife or the survivor of them. The slaves were in the possession of Simons and wife during their joint lives; the wife died and the husband by deed surrendered his life estate to the trustee, for the use of the children of the marriage, and requested the trustee to sell the said negroes and invest the nett proceeds (after paying the debts and funeral expenses of Mrs. Simons,) in other property for the children, and to have them educated out of the interest and income, if possible; if not, to apply so much of the share of each to that purpose as might be necessary. Under this authority, the trustee sold on the 2d of November, and Charles Simons, the grantor, died on the 9th. After this statement there can be no doubt that the purchaser's title is good. For the trustee had not only a legal estate in the property, but he had also *a power to sell,* and at law the title cannot be disputed. If his power was improperly applied, fraudulently used, or unnecessarily exercised, it may be redressed in Equity against the trustee; and if the purchaser *had [*298 notice, he, too, may *there* be reached. The motion is dismissed.

Richardson, Evans, Butler, and Wardlaw, JJ., concurred.

Thompson, for the motion. *Kunhardt,* contra.

See Sp. Eq. 591. *An.*

IN THE COURT OF 3.

Willard Watson, Trustee, *vs.* Edward Pitts.

Before Richardson, J., Newberry, Spring Term, 1831.

This was an action of trover to recover certain negroes and other property which were sued for by the plaintiff, as trustee of Ann Barlow. The plaintiff derived his title to the property sued for from John Barlow, the husband of said Ann. It

appeared that John Barlow, in consideration of marriage, in the year 1808 conveyed the negroes and other property in dispute to William Shaw, Esq., his heirs and assigns, in trust for the use of his wife Ann, during her life, and after the death of the husband, then to vest absolutely in his wife Ann, as the Court understands the deed, but as plaintiff's counsel supposes, the legal title to said property and negroes is still vested in the trustee or his assigns. Wm. Shaw accepted the trust, and continued to act down to 1816, when he assigned the trust by an endorsement on the trust deed to Willard Watson, the plaintiff. Shaw died in 1821 or 1822. John Barlow, some time after the death of Shaw, departed this life, leaving his widow, Ann, alive. After the death of J. Barlow and W. Shaw, Ann Barlow and Willard Watson, the plaintiff, applied to the Court of Equity, in 1829, and the plaintiff was, by the order of that Court, appointed trustee in the room of Shaw, deceased, and then the property was demanded and sued for by plaintiff, in September, 1829. So that the only question for the Court now to determine is, in whom was the legal title to the property sued for at the time this suit was brought? If, as the plaintiff supposes, by the terms of the deed it was in him, the nonsuit must be set aside. But if in the widow, Ann Barlow, from the death of her husband, as the Court held, the nonsuit is to be confirmed.

Plaintiff appeals, on the grounds,

*299] 1. *That from the case made by the evidence, the legal title to the property sued for was in plaintiff as trustee, and not in Ann Barlow, as held by the Court below.

2. Because the parties had fixed the construction of the deed as vesting the legal title of said property in the plaintiff.

3. Because Ann Barlow herself had admitted the legal title to the property in dispute to be in the plaintiff, and procured him to be appointed her trustee by the Court of Equity, as to the property in dispute, after the death of John Barlow, her husband.

Curia, per JOHNSON, J. In *Jones* vs. *Coles*,(*a*) decided during the present sitting, it was decided, upon very satisfactory principles, (if it had been possible to consider the question doubtful,) that any one having property(*b*) or the right of possession, might maintain trover for its wrongful conversion by a stranger: and I refer to that case for the doctrine of law. The deed from John Barlow to William Shaw, conveys the legal property of the negroes in dispute, in appropriate legal terms, and it is declared to be "to the use of, and in trust nevertheless, for the sole use, benefit and behoof of the said Ann, from this date, for and during the term of her natural life." It is true, there is no disposition made of the property after the termination of Mrs. Barlow's life estate, but according to the legal effect of the deed, the property is in Shaw, until her death (for the statute for transferring uses into possession, is limited to real estate,) and it is necessary that the legal property should abide in him, to enable him to fulfil the trust declared in the deed. A conveyance in trust was necessary to obviate the marital rights of the husband, which would have arisen out of a direct conveyance to herself—and as long as she lives the same necessity will exist, as she may again take a husband. Whether, therefore, we consider the rights of Shaw, in reference to the legal effects of the deed, or the trusts executed under it, the legal estate would have abided in him had he been living. The Act of the Legislature expressly authorizes the Court of Chancery to substitute a trustee for one who is deceased, where no provision is made in the deed or will for that event; and all the formula of that Act were observed in the order substituting the plaintiff in the place of Shaw. The assignment

(*a*) MS., Columbia, 1831. *An.* (*b*) See 2 Rich. 80; 2 Sp. 181.

made by Shaw was void, for want of a power to that effect in the deed. But under the order of Chancery, all powers which he had, were transferred to the plaintiff.

We are therefore of opinion that the motion should be granted—and it is accordingly so ordered.

O'NEALL and HARPER, JJ., concurred.

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*DESCOTTES & O'DRISCOLL *vs.* ANN TALVANDE. [*300

Where one died intestate, seized and possessed in fee simple of a house and lot in the city of Charleston, leaving surviving him as his next of kin a wife (the defendant, who is an alien) and nephews, born of alien sisters, and a brother, a native-born subject of the United States, but who has resided in France for the last thirty years—in an action of trespass to try titles to the said freehold, between the nephews (sons of the alien sisters of the deceased) and the wife, it was *Held*, that upon the death of the intestate, the freehold descended upon the brother of the intestate; that he alone could take the estate under the statutes of South Carolina.

Before RICHARDSON, J., Charleston, January Term, 1841.

The following able report of his Honor who tried the case in the court below, is given *in extenso*, that the facts of this important case may be fully understood.

"Trespass to try title to a lot of land in Charleston, as well as for damages. The freehold was well proved to have been in Andrew Talvande, by deeds of conveyance to himself, and by possession from 1819 to 1834, when he departed this life, leaving the defendant, his widow, an alien born in St. Domingo. He left, also, several near relations, all aliens, but a brother born in New York, and a resident of France for more than thirty years. Edward and Augustus Descottes, two of the plaintiffs, were the sons of his sister, Mrs. Descottes, an alien, still alive; and William O'Driscoll, the other plaintiff, was the son of his sister Mrs. O'Driscoll, who died before her brother, Andrew Talvande, and was an alien at her death. The plaintiffs were citizens.

The premises remained in the possession of the defendant ever since the death of Mr. Talvande. They were proved to be worth $1,000 rent per annum. Mrs. Talvande claimed the premises in her own right—1st, by possession; 2, as a resulting trust, (her services and money having contributed largely to the purchase;) 3d, as a sole trader, (having carried on a lucrative female school all the time, in her own name;) 4th, as virtually a citizen, under the Act of 1785, and therefore holding as a tenant in common; 5th, as virtually a denizen, under the Act of 1799, and so capable of holding lands, &c.; 6th, under the Act of 1807, which confirms the titles made by aliens; 7th, *under the Act of 1828,(a) [*301
as preventing such lands from being escheated, and rendering the widow, though an alien, capable of taking by virtue of the act of distributions; and under the Act of 1835, as releasing the rights of the State

(a) 6 Stat. 363. *An.*

to her. Among these and other grounds against the plaintiffs, it was urged that E. and A. Descottes could not take under the Act of distributions, because they claim through an alien sister of the intestate, their mother being still alive. That the other plaintiff, W. O'Driscoll, could not take, because Armand Talvande, the brother of intestate, being alive, a native citizen, and nearer of kin, as in the case of E. and A. Descottes; so in this case, the brother native born would take, in exclusion of nephews claiming through the alien sisters of the intestate. That thus, as the right of E. and A. Descottes as distributors, living their alien mother, could not be supported; (see the judgment of the S. C., U. S., 9 Wheaton, 354, *McCrary* vs. *Summerville & Rowe*;) so, by parity of reasoning, O'Driscoll could not support his right, through an alien mother deceased, living a native born brother of the intestate.

It is unnecessary to notice further the facts or grounds of this well contested and important case. The grounds of the appeal that followed the verdict are presented.

I charged the jury, that Mrs. Talvande, being an alien born and having never been made a citizen or denizen expressly, could not have been virtually the one or the other, under any of the Acts relied upon, and therefore could take no part of the land by mere operation of law, though she might hold by purchase. That her long possession, jointly with Mr. Talvande, inured to his benefit as the freeholder, under written titles to himself. That her capacity as mistress of a school, though conducted exclusively in her own name, did not make her a sole trader in law. That the fruits and contributions of her highly meritorious exertions belonged to her husband, and would not create such a resulting trust to her as a court of law, at least could enforce. That it was plain, then, that the conveyance of the lot to Mr. Talvande was unqualified, and he the exclusive freeholder at the time of his death, October, 1834. Who, then, were his heirs, or distributees, under the Act of distributions, was the question for the Court and jury.

*302] *Mrs. Talvande, being unfortunately still an alien, could take no part under the Act, or in dower. The plaintiffs might, then, well maintain their action, provided they were the proper disbutees under the Act of 1791. Upon the claim on their part, I charged the jury, that I was bound, by the authority of the decision of the Supreme Court of the United States, in the case of *McCrary* vs. *Summerville*, to say that the law was opposed to the right claimed by E. and A. Descottes, because their alien mother was still alive. I thought this a stronger case because a native born brother, Armand Talvande, stood as undoubted heir to the whole or part, and would prevent the possibility of any escheat of the land to the State. He stood as the heir at common law, and his rights were not to be infracted but by the unavoidable constructions of the statute.

That, in regard to the right of William O'Driscoll, the nephew, by a deceased alien sister, the brother of intestate being alive, I held the proper construction of the Act questionable. The right of his brother to one half, or the whole of the land, could not be questioned; and standing as he did upon both the spirit and letter of the Act, there was little room for a liberal construction in favor of any other party, plaintiff or defendant. Such constructions were misapplied, when they would infract

vested rights to property. And, inasmuch as the Act did, in terms, give to the nephew only the share to which his deceased parent would have been entitled if living, it was but by a liberal construction, in virtue of and under the statute of 11 and 12 William 3, that O'Driscoll could be made a distributee at all. Claiming, as he did, through an alien mother who could have taken no part, I thought it the safer construction of the Act, to give to the brother, Armand Talvande, the whole estate, as the only one clearly entitled.

If the jury thought with the Court, they would of course find for the defendant; but if they found for the plaintiffs, they should add such damages as their sound discretion pointed out. That was a question for themselves. They returned a verdict for the defendant, and the plaintiffs appeal."

1st. That his Honor erred in charging the jury that the *children of Madame Descottes could take no share of the real estate of Andrew Talvande. [*303

2d. That the Court erred in stating to the jury that Mr. O'Driscoll, the nephew of Mr. Talvande, had no share in his estate.

3d. That consequently there was error in the charge that the entire fee simple of the estate vested in Armand Talvande, supposed to be absent.

4th. That in other particulars the Judge erred, especially in stating that the jury were authorized to give nominal damages, in face of the uncontradicted testimony that the premises were occupied by the defendant, and that a reasonable rent for the premises was one thousand dollars per annum. Plaintiffs insist that where mesne profits are distinctly proved, the jury is not authorized to disregard the evidence, and, in violation of their oaths, "true verdict to render, according to evidence," to give nominal mesne profits, where actual rent has been enjoyed by defendant.

Bentham and *Hunt*, solicitors for appellants.

Petigru and *Lesesne*, contra.

Curia, per O'NEALL, J. The 4th clause of the first section of the Act of '91, 1 Faust, 24,(*a*) provides, "If the intestate shall not have a lineal descendant, father or mother, but shall have a widow, and brothers and sisters, or brother or sister, of the whole blood, the widow shall be entitled to one moiety of the estate, and the brothers and sisters, or brother or sister, to the other moiety, as tenants in common. *The children of a deceased brother or sister* shall take among them, respectively, the share *which their respective ancestors would have been entitled to, had they survived the intestate.*

The Act of '97,(*b*) amending the Act of '91, provides for the case where the wife be dead, and lets in the brothers and sisters, in that case, to participate in the inheritance, and prescribes "that *the issue*, if any, of *any deceased brother or sister*, if more than one, shall take among themselves the same share *which their father or mother, if living*, would have taken; and *if but one such issue, then he or she shall take the share which his or her father or mother would have taken if living.*" 1 Brev Dig. Tit. 101, sec. 20, p. 427.

*Considering the plaintiff's case under these Acts alone, and giving to the alienage of the wife the same effect as her death, (as to the correctness of which I think there is great room to doubt, but as that is the best view for the plaintiffs, it may be conceded for the present,) [*304

(*a*) 5 Stat. 162. *An.* (*b*) 5 Stat. 305. *An.*

it would be plain that they could not recover; for the Descottes are not the children of a deceased brother or sister, *their mother being still alive*, but an alien; and O'Driscoll could not recover, because his mother died an alien, and if alive could not take any portion of the intestate's estate.

It was, however ably contended, that under the Stat. 11 and 12 W. 3, c. 6,(*a*) which is of force in this State, the plaintiff O'Driscoll might take with the brother of the deceased. It provides, "whereas, divers persons born within the King's dominions are disabled to inherit, and make their titles by descent from their ancestors, by reason that their fathers or mothers, or some other ancestor, (by whom they are to derive their descent,) was an alien, and not born within the King's dominions: for remedy whereof, be it enacted, that all and every person or persons, being the King's natural born subject or subjects, within any of the King's realms or dominions, shall and may hereafter lawfully inherit and be inheritable as heir or heirs to any honors, manors, lands, tenements, or hereditaments, and make their pedigrees and titles by descent from any of their ancestors, lineal or collateral, although the father and mother, or fathers and mothers, or other ancestors of such person or persons, by, from, through or under whom he, she or they shall or may make or derive their title or pedigree, were or was or is or are or shall be born out of the King's allegiance, and out of his Majesty's realms and dominions, as freely, fully and effectually, to all intents and purposes, as if such father or mother, or fathers or mothers, or their ancestor or ancestors, by, from, through or under whom he, she or they shall make or derive their title or pedigree, had been naturalized or natural born subjects within the King's dominion—any law or custom to the contrary notwithstanding."

This statute, it seems to me, will not help the plaintiffs; for it only intends to remove the obstacle to the title of one claiming as heir to the *305] person last seized, that he is obliged *to trace his descent through an alien ancestor. If the intestate had not left a brother, a native born citizen of the United States, then the plaintiff, O'Driscoll, might very well have claimed as heir, tracing his title by descent,(*b*) as next of kin, through his mother, and being preferred on account of his citizenship before the alien sister of the deceased. But he cannot now so claim, because there is one nearer in blood, who is able to take the inheritance. The title of O'Driscoll is dependant upon the capability of his mother, and is wholly deprived from her. *Levy* vs. *McCarter*, 6 Peters, 102. He does not come in as heir, but *as one* who, on account of equity of the statute, is permitted to represent his mother. As she could not be entitled to any part of the inheritance, it follows that her representative can be entitled to nothing; and when he is allowed to trace his descent through her, under the statute of Wm. 3, he cannot claim, as next of kin, on account of the brother being nearer in blood than he is. This is, it seems to me, the true construction of the Acts of '91 and '97, and the stat. 11 and 12 W. 3, c. 6, when construed together, and *in pari materia*. But, if there be any conflict between their provisions, then, so far as they do conflict, the Acts of '91 and '97 are to prevail.

(*a*) 2 Stat. 582. See *Shanks* vs. *Dupont*, Harper's Eq. 1, reversed upon writ of error in the Supreme Court of the U. S., 3 Pet. 242, or 8 Curt. 395. *An.*

(*b*) 1 Sp. 536 *An.*

If, however, O'Driscoll was entitled, still the plaintiffs must fail in this case; for the Descottes are not, in any event, or in any wise, entitled; and hence, too many plaintiffs being before the Court, they cannot succeed.(*a*) In Hammond's N. P. 223, it is said: "The consequence of inattention to these rules, where it consists in joining too many as plaintiffs, are the same in all forms of action. Where the defect is apparent upon the record, the defendant may demur, arrest the judgment, or reverse it by error, or he may plead the general issue, and thereby succeed at the trial."

The motion is dismissed.

RICHARDSON, EVANS, BUTLER, EARLE and GANTT, JJ., concurred.

This case was argued in the Appeal Court, at Charleston, first, February Term, 1841. It was held under advisement until February Term, 1842.

See *Ford* vs. *Hindeman*, 7 Rich. 166; *Keenan* vs. *Keenan*, 7 Rich. 349; *Burnett* vs. *Noble*, 8 Rich. Eq. 58. *An.*

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*ST. PHILIP'S CHURCH *ads.* JOHN WHITE. [*306

The books of a tradesman or mechanic are admissible in evidence only to prove the performance and delivery of work done within the mechanic's shop. Where the work is done outside of his shop, or on the premises of the party charged, such as building or repairing a house, or any other fixture, there can be no necessity for books, for the work is apparent and palpable.

In the City Court of Charleston.—Tried before his Honor the RECORDER, July Term, 1841.

This was an action of assumpsit to recover an account for laying a stone pavement in front of St. Philip's Church. The evidence in detail is given, together with the Recorder's charge to the jury, for a full and proper understanding of the case.

"*Defence.*—Work not done in a workman-like manner, and that the city council, and not the Church, was the contracting party with White.

George Thompson, sworn—Said he examined the stone pavement in question; he is a bricklayer, and a judge of work of this sort; it appeared to be very well done; thought it a workman-like job; one or two stones have settled; the pavement is rather flat; no water, however, can lay on it; there is a great descent north and south; it has a descent towards the street, but don't show it; he examined it last Thursday, (two days before;) $536 is a reasonable charge for such work; there are fully two thousand five hundred and forty-four feet of flagging.

Cross-examined—He said the object of the inclination of a pavement is to throw off the water; the water runs north and south, and off to the street; never saw water settle under the porch; the pavement is two and a half inches lower on the outer than the inner edge; the width under the porch is twelve or fourteen inches; the eye cannot detect any slope in the pavement, unless you go off some distance; the wall of the church is about two hundred feet; under the porch the width of the pavement is twelve feet, less in some other parts.

In reply—He said the pavement is a curve; the water don't settle in puddles so as to annoy passengers.

John White, plaintiff, introduced his books of original entries; the entry was

(*a*) 1 Sp. 99; 1 Bail. 306. *An.*

307] made as soon as the work was finished. The books were objected to; objection overruled. Here evidence of plaintiff closed.

DEFENCE.

Charles Parker, sworn—Said he is city surveyor; gave White directions how to proceed with this work; he was called upon by White, after the work was finished, to measure it for him; he refused; his work did not correspond with his directions; witness told the mayor he would not measure the work; he produced a memorandum, dated 19th August, 1839, detailing particularly the defects, with a plat of the pavement, to which I refer as part of his evidence; says it is not a workman-like job; it ought to be taken up; White knew witness represented the city, and that he give his directions as such; he knew he could not be paid by the city without his certificate; he refused to give it; White ought to take up the whole of this work to make it a good job; he said he could not pretend to guess at the quantity, knowing there were curves.

Cross-examined—He said he did not make the contract with White; he had nothing to do with the church; represented the city; the custom is, in such cases, for individuals to pay the workmen, and look to council for reimbursement of their portion; there is an inclination to the north; but a large portion to the south there is no inclination at all; in one place there is an inclination inwards to the wall.

In reply—He said he supposes the pavement could be taken up and relaid at from five to seven cents per square foot; the pavement of the portico was laid before he laid out the work for White; don't think as much of the pavement ought to stand as that table, (pointing to the table in court,) to do it in a practical way.

Charles P. Frazer, sworn—Said he was at the time clerk of the commissioners of the streets; the city got work of this kind done for $2 20 per square yard; the kind of work White did commands the highest price; accompanied Parker on one occasion while the work was in progress; saw Parker make White take up some of the work; White has done no other work for the city, except some cross-

*308] ing places; witness called on Mr. Trescot, the chairman of the *vestry of the church, and urged him to have this work done, assuring him the city would pay one-half of the cost; the custom is, sometimes, for the city to pay the mechanic directly; sometimes to pay the owner of the premises where the work is done, and the mechanic looks to him; Parker would never give more than one certificate; whoever held that got paid.

William Brocklebank, sworn—Said he was working at the church the time this work was done; he is a judge of such work; thinks it a fair job; it is a substantial job; done in a workmanlike manner; thinks it worth twenty-five cents a foot; he has passed there in rainy weather; has been caught there in showers; never saw water stand there.

Henry J. Harby, sworn—Said he works near the church; travels over the pavement six times a day, and thinks it a fair job; passed in rainy weather; was never incommoded; a fair pavement for throwing off water.

William T. White—Said he works with his father; has frequently done work when individuals and the city divided expenses; invariably sends the bills to individuals; laid a great many pavements in Broad street, when the owners and city divided the expenses; his father always looked to individuals for payment.

Richard Yeadon, Esq., sworn—Said he was a member of council for one year; the usage was for the owners to apply to council for permission to lay flag stones, and for the city to pay one-half of the cost. The land on which the pavement was laid was admitted to belong to the city, having been conveyed to them by deed before the work was done.

Edward McCrady, Esq.—Admitted that on the part of the church he had offered to pay one-half of the bill, and tendered the amount and costs, and did say if required would pay it in specie.

William Bell, sworn—Said he has seen the pavement; examined it particularly the other morning; it is a very fine job; done in a workmanlike manner; has seen pavements with more descent; this throws off the water sufficiently well;

never found water lying on it; the object of descent is to throw the water off; it has done this.

Here the testimony closed.

*A motion was made for a nonsuit, on the ground stated in the notice of appeal, which was refused, and the case went to the jury. [*309

The Court charged the jury that there were two questions for them to decide. 1. Was the work done in a workman-like manner? 2 Was the defendant liable to the plaintiff, and if so, to what extent? On the first question, the evidence was summed up and submitted to them. On the second, the jury were told they could derive no aid from custom; if any had been proved, it was not sufficiently uniform, or of sufficient duration, to presume that this contract was made in reference to it. The books of the plaintiff charged the work to defendant, at the time of its completion, and it appeared to the Court, from the evidence of Frazer, that it was properly so charged, and that the church was the contracting party with White, and he says he called on Mr. Trescot, the chairman of the vestry, and urged him to make the contract with White, assuring him that council would defray half the cost. That White did the work, was not denied. There was no evidence of any contract with the city, and it appeared by account sued upon, that White was the workman of the church. The evidence on this point was summed up and submitted to the jury, as a question of fact. They found a verdict for plaintiff for the full amount of his demand.

The defendants appealed from the verdict in this case, and moved in the Appeal Court, first, for a nonsuit, on the ground, that no express contract was proved, and none could be implied, as the work was done in a public street, over which the defendant had no control, and could not have prevented its performance.

And failing in this motion, then for a new trial on the following grounds:

1. That the plaintiff's books were incompetent evidence, and ought not to have been admitted to prove either the liability of the defendant, or the measurement of the work.

2. That books of entry are competent evidence only of goods delivered, or jobs done in the shop or premises of the shop-keeper, tradesman, or mechanic.

3. That defendants, upon the testimony, were not liable *for more than one-half, in any event; there being no proof of a custom, such as was set up on the part of the plaintiff, to entitle him to recover the whole from the defendants. [*310

4. That the verdict was contrary to law and evidence.

McCready, for the motion, said the church did not deny their liability to pay one-half of the price of the work done. The question is, were the books of the plaintiff admissible? Were they competent testimony? Cited 2 Bay, 172; 2 Ib. 362; 1 Brev. 105; jailer's books have been excluded, 3 Brev. 251. There was no necessity for his books; the work is apparent, and will speak for itself: 2 Brev. 127. A scrivener's books have been held not to be evidence, and the books of planters are excluded; 2 Brev. 157; 1 N. & McC. 151. Note books are not evidence to prove a special contract. In *Ferguson* vs. *Ford*, A. D. 1826, a party can only prove the usual items of a merchant's contract. The books are incompetent to prove an item for cash lent, or any special contract; 1 N. & McC. 130. The dictum was, that shop-books of a mechanic are evidence to prove specific articles in the way of his trade. Loss of time could not be thus proved: 1 N. & Mc. 186. Printer's books are evidence as daily *memoranda*, when no other evidence could be appealed to; 1 N. & Mc. 436, *Deas* vs. *Darby*. Book entries

prove only a delivery. 1 P. on Obl. was cited as to book entries. The defendants, if liable at all, could only be liable for one hundred and forty-four feet, or twelve feet square, at $25—$300. Formerly the city required every one to pave before his door; such is not the case now.

Yeadon, contra, contended that there would have been no difficulty, had it not been for the fastidiousness of the city surveyor. He contended that this evidence was admissible as evidence from necessity. But by this he does not understand that this is the only proof which can be received. He referred to 1 N. & McC. 136, as illustrative of his views as to the nature of the entry; the charge there was for one hundred and ninety days work and labor; it was held admissible to prove a particular job of work done and articles furnished. In 1 N. & McC. 186, the entry is a memorandum of daily transactions, and so was this book. 1 N. &
*311] McC. 436, was when the liability was to arise from something *else than the delivery. There the entry was inadmissible. He contended the book was admissible, because: 1, it was his handwriting; 2, according to the course of trade; 3, as daily memoranda; and 4, it was a particular job. The entry was admissible, if not to prove the delivery, yet it was admissible to show that he never looked to the city. This, as a part of the *res gesta*, was admissible. The usage of the city is, where a man will flag his own ground they will pay one-half. Throw the books out, and still there was enough to support the verdict; and hence there should not be a nonsuit or new trial ordered. The work was done before the church, and $100 paid; they offered to pay one-half.

Curia, per O'NEALL, J. The only ground which will be considered is that which makes the question, whether the plaintiff's book was admissible to prove the entry, "1839, August 24th, to furnishing and laying 2544 feet of stone flagging, curb and gutter stone, at 25 cents per foot, $636." The plaintiff is a stone cutter, and stone mason, and the item set out above is a part of a running account against the defendants for other work and materials, all of which has been paid, except this item, and to it is applicable $100 paid by the defendant generally on the account.

In *Slade* vs. *Teasdale*, 2 Bay, 172, the court ruled that the book of a mechanic was competent evidence in a suit brought to recover for work done or materials furnished in the way of his trade. The reason given for the admission of such book in evidence was, "it had long been established as a rule, that all classes of men who were obliged to keep books, in the way of their trade, should be put upon the same footing." This principle thus settled was enforced in innumerable cases, and with little restriction, until the case of *Lynch* ads. *Petrie*, 1 N. & McC. 130. In that case the court wisely undertook to limit the operation of the rule. It was an action for work and labor, as a bricklayer; the charge or entry was for 190 days work and labor as such. The court held that the entry was inadmissible. Johnson, J., said, speaking of the admissibility of books, "those of a mechanic are, I think, admissible to prove the per-
*312] formance of a particular job of work in the course of *his trade, and articles furnished." To this I assent, but with this qualification, that "the performance of a job of work," as a book entry, *must be of something which is ultimately delivered to the defendant:* such as work done in shops kept by the plaintiff. In that way it comes appropriately within the reason of the rule deduced from the recital in the county and precinct court Act of 1721, for it declared the law before in the Province to be, "that books of account shall be allowed for evidence, the plaintiff swearing to the same, by reason that the merchants and *shop-*

keepers in South Carolina had not an opportunity of getting *apprentices* and servants to *deliver* out their goods and keep their books, as the merchants and *shop-keepers* in Great Britain had." Merchants and *shop-keepers*, it is to be observed, are the only parties who are permitted, under the law thus recited, to verify their books by their own oaths, and that, too, because they could not have apprentices and servants to prove the delivery of goods and keep their books. To come in under this rule, the party must seem to be in the same necessity, and therefore within the reason of the rule. I can readily perceive the necessity for a mechanic, doing work in his shop and delivering it out, to keep books and to be permitted to prove his entries. But when it is work done outside of his shop, and on the defendant's premises, as building or repairing a house, or any other fixture, there can be no necessity for books, for the work is apparent and palpable, and the only questions are, by whom was it done? and for whom? Neither of these questions are properly to be answered by an entry made by the plaintiff. It only proves a delivery of something made or repaired or sold by the plaintiff. Regarding the qualification of the rule stated in *Lynch* ads. *Petrie*, which I have thus stated and enforced, to be proper, the plaintiff's entry could not, under it, be received.

In the same case, Johnson, J., speaking of the generality of the entry, said, "the evidence admitted in this case is a charge for work and labor only, and contains no specification, except that of time. If entries of this character were admitted, every description of persons who work for him would have nothing to do to warrant a recovery but to measure their services by this standard." *In *Thomas* vs. *Dyott*, 1 N. & McC. [*313
186, the same Judge stated, "that as far back as it was possible to trace the subject, the books of merchants and mechanics of every description, which have been fairly and regularly kept *as daily memoranda of their transactions, have been admitted as evidence of goods or other articles delivered.*" The fact that entries are "daily memoranda," seems to be essential to their admissibility. Hence a general entry like that in *Lynch* ads. *Petrie*, or as in this case, cannot be received; for in both cases we have an aggregate charge, a general result, and not that of each day's business or work. We therefore think the entry was improperly received; and hence, as the evidence in the case does not put it beyond dispute that the work was done, and the flagging, curb and gutter stone furnished *by the plaintiff for the defendant*, we think a new trial must be granted.

The motion for a new trial is accordingly granted.

Richardson, Evans, Butler, and Wardlaw, JJ., concurred.

See Supra, 133; 2 Sp., 286; 9 Rich., 296. *An.*

GEORGE W. STONEY *vs.* D. R. BEAUBIEN.

1. Where a party writes his name on the back of a promissory note, payable to a third person, not yet due, without express words to show the nature of his contract, he will be held as an original promissor.
2. It seems the undertaking will be regarded as original, and not collateral.

Before O'NEALL, J., Beaufort District, Spring Term, 1841, whose report of the case is as follows:

This was an action of assumpsit, brought on the following note: "$700, (seven hundred dollars.) On or before the first day of May next, I pro-
*314] mise to pay to George *M. Stoney, or order, the sum of seven hundred dollars, for value received. John M. Zealy. Beaufort, December, 13th, 1838." On the back, the defendant wrote his name, "D. R. Beaubien." The plaintiff's declaration counted, 1st, vs. defendant as maker; 2d, as guaranty; and 3d, on the money count. It appeared that Zealy was engaged in building a house for the plaintiff. To obtain the sum of seven hundred dollars, to enable him to purchase lumber, he asked, as he said, Beaubien to endorse this note, which he had previously drawn, which he did. The object was, he said, to make it good to Dr. Stoney, the plaintiff. On presenting the note thus secured, he obtained the money from the plaintiff. There seemed to be no doubt from the proof, that Mr. Zealy was unable to pay his debts; although it was equally clear, that he was an honest, trustworthy and enterprising mechanic. To secure the defendant, he had confessed a judgment to him for this debt. The following letters of the plaintiff were given in evidence by the defendant:

"*Hilton Head*, 14*th December*, 1838.

"Dear Sir—By man Prophet, I have, in accordance to your request, enclosed in a separate package, sealed, $700—(seven hundred dollars,) which I hope will reach you in safety. I have received your obligation, with Mr. Beaubien's *endorsement*, for the amount remitted.

"Yours, &c., GEORGE M. STONEY.

"To Capt. John M. Zealy, Beaufort."

*315] *"*Beaufort*, 3*d May*, 1839.

"Dr. R. Beaubien, Esq.,

"Dear Sir—In conformity to the usage and custom of business, I merely notify you, that the note given in my favor against Capt. John M. Zealy, for seven hundred dollars, and for which your are *endorser*, came due on the 1st inst.

"Respectfully, your ob't serv't,

GEORGE M. STONEY."

On the closing of the plaintiff's case, the defendant moved for a nonsuit, on two grounds: 1st, that the proof did not sustain any one of the counts in the declaration. 2d, that the note of Zealy, with Beaubien's name on the back of it, could not be a promissory note. The motion for a nonsuit was overruled; the case went to the jury, who were instructed, the plaintiff could not recover, on the counts treating the defendant's liability as arising as endorser or guarantor; that (if he was liable at all) I thought

it was as drawer of the note. This, I told them, was, I thought, the true view of his liability. For looking to the instrument, and reading it in connection with the names upon it, it was an unconditional several promise on the part *of Zealy and Beaubien, to pay according to the tenor of the note. The case of *Nelson* vs. *Dubois*, 13 J. R. 175, seems to me to be this case. The note in that case was made by Brunbridge, payable to the plaintiff; and on the back of it the defendant wrote his name. The note was made by Brunbridge, for the price of a horse, which Nelson would not agree to sell him without security. This note was written by Dubois, who, after Brunbridge signed it, wrote his name on the back of it, and delivered it to the plaintiff, and said he considered himself bound to pay the note, and guaranteed the payment of it. The analogy of that case to this will be perceived by remembering that the note here was made to procure money, and that the object of Beaubien's signature was to make it good to the plaintiff; and that when the note, thus signed, was delivered to the plaintiff, he sent to Zealy the money. [*316

In the case of *Nelson* vs. *Dubois*, 13 J. R. 175, Spencer, J., said, "I confess I do not perceive that this case is at all within the statute (of frauds and perjuries;) the defendant's promise is not to pay on default of Brunbridge, but is an original undertaking as surety; and the defendant

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STATE OF SOUTH CAROLINA, BEAUFORT DISTRICT. } *In the Common Pleas.*

D R. Beaubien was attached to answer to George M. Stoney, in a plea of *trespass* on the case, and so forth, to his damage, fourteen hundred dollars.

Whereupon the plaintiff complains: For that the defendant did, on the thirteenth day of December, Anno Domini, 1838, together with one John M. Zealy, make their certain promissory note, their own proper hands being thereunto written, by which said note, the defendant did jointly and severally with the said John M. Zealy, promise to pay or cause to be paid unto the plaintiff or his order, the full and just sum of seven hundred dollars, on or before the first day of May, then next ensuing, for value received. By reason whereof, and by force of the statute in such case made and provided, and made of force in this State, the defendant became liable to pay to the plaintiff the said sum of money, in said note contained, according to the tenor and effect of said note. And being so liable, the said defendant afterwards, to wit: on the same day and year aforesaid, at Beaufort, aforesaid, and within the jurisdiction of this Court, in consideration thereof, upon him did assume, and to the plaintiff the said sum of money then and there faithfully promised, that he, the said defendant, would well and truly pay, according to the tenor and effect of the said note. And for that the defendant, on the day and year aforesaid, in consideration that the plaintiff would lend and advance to the said John M. Zealy, a certain large sum of money, to wit: seven hundred dollars, which he the plaintiff had occasion for, on a credit from that time to the first day of May, then next ensuing, and take the note of him the said John M. Zealy, payable at that time, he, the defendant, undertook and promised to guaranty to the plaintiff the payment of the said note; and that the plaintiff, confiding in the said promise and undertaking of the defendant, did, on the day and year aforesaid, lend and advance to the said John M. Zealy, the sum of seven hundred dollars, on a credit from that time to the first day of May, then next ensuing, and took his note, therefor, payable to the plaintiff or his order, on the day last mentioned; to which said note the defendant became a party, his own proper hand being thereunto written as guaranty for the payment thereof, and then and there faithfully promised and undertook to pay the same, if payment thereof was not made by him the said John M. Zealy, on the day last mentioned as aforesaid; and that the said John M. Zealy did not, on the first day of May

*317] *is as much holden, as if he had signed the body of the note." This view of the case was concurred in by all the Court, (except Van Ness,) and I thought it presented the true rule by which this case was to be decided. It was supported by *Frampton* vs. *Dudley*, 1st N. & M'C. 128; *Eccles* vs. *Ballard*, 2d McC. 388.

The jury found for the plaintiff, and the defendant appealed on the subjoined grounds for a nonsuit:

1. Because the proof offered by the plaintiff, did not sustain any one of the counts in the declaration.

2. Because a note of hand simply endorsed by one who is not a party to it, does not of itself amount to a note within the statute 3 and 4 Ann, upon which he can be sued as drawer; and his Honor erred in ruling, that the defendant's name on the back of the note sued on, was equivalent to his signature at the bottom of the said note.

And failing therein, for a new trial, on the grounds:

1. Because the jury ought to have been charged, that a note like the one sued on, and endorsed by a person not a party, raises the presumption that the endorser intended to bind himself as second endorser only, and not as drawer; and that that presumption should prevail, until the contrary was shown.

2. Because the testimony showed clearly that the defendant, in putting his name on the back of the note, intended merely to bind himself as an endorser; and that the plaintiff understood his obligation or undertaking to be merely as an endorser according to the custom of merchants.

3. Because his Honor erred in charging, that inasmuch as the said D. R.

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last mentioned, pay the said sum of money in said note contained, but the same, and every part thereof, did then, and from thenceforward hath continually refused and neglected to pay, and still doth refuse, whereof he the defendant had notice; by reason whereof, the defendant hath become liable to pay to the plaintiff the said sum of money in said note contained, according to the tenor and effect of said note.

And for the defendant, on the day and year aforesaid, at Beaufort aforesaid, was indebted to the plaintiff in another sum of seven hundred dollars, for money by the plaintiff, before that time, laid out, expended and paid for the said defendant at his special instance and request; and for other money by the plaintiff, before that time, lent and advanced to the use of the defendant, and at his special instance and request;—and for other money by the defendant, before that time, had and received to the use of the plaintiff; and being so indebted, he the defendant, in consideration thereof, assumed upon him, and the said several sums of money to him the plaintiff, then and there as aforesaid promised and undertook to pay. Yet the defendant, his said several promises and undertakings in manner and form aforesaid made, in no wise regarding, but contriving and fraudulently intending the plaintiff in this behalf to deceive and defraud, the said several sums of money above mentioned, or any part thereof, to the plaintiff hath not paid, although oftentimes required so to do; but the same to the plaintiff to pay, or any part thereof to pay, hath hitherto wholly neglected and refused, to the damage of the plaintiff, fourteen hundred dollars, and therefore he brings his suit, and so forth.

E. & A. RHETT, *Plaintiff's Attorneys.*

[COPY OF NOTE.]

"$700—(Seven Hundred Dollars,)

On or before the first day of May next, I promise to pay to George M. Stoney, or order, the sum of *seven hundred dollars*, for value received.

JOHN M. ZEALY."

Beaufort, December 13th, 1838.

Endorsed, D. R. BEAUBIEN.

Beaubien was not chargeable as an endorser or guarantor, he was answerable only as a drawer; whereas, it is respectfully submitted, that the said D. R. Beaubien might be charged as a party to the original contract, (though not as a drawer of the note,) if sufficient evidence of his intention, and of a consideration, had been produced

*4. Because the construction put by his Honor upon the effect of the defendant's signature on the back of the said note, is to alter the nature of the obligation which he intended to assume, and believed he had assumed, and which the plaintiff understood he had assumed, and to make him a party to a contract of a character essentially different. [*318

5. Because the verdict of the jury was contrary to the weight of the evidence.

6. Because the sense in which the said Dr. George M. Stoney understood and used the words "endorsement" and "endorser," was a question entirely for the jury, and ought to have been submitted to them as such.

De Treville, for the motion, on the ground for a *nonsuit*. said there was a difference between the *Allegata* and *Probata*. He cited 12 J. R. 159; 17 *ib.* 326; Chitty on Bills, 195; Bail. on do. 456. Moise's case is more analogous to this case, 11 Mass. Rep. 436; Chitty on Bills sustains this view. In Mass. the statutes three and four of Ann are not of force. Chitty on Bills, 64; 3 Kent Com. 90; 7 Com. Rep. 48.

On the sixth ground, he contended there was error in the instructions given to the jury.

E. and *A. Rhett*, contra, said the word "endorser," in common parlance, is a *surety*. What did Beaubien mean by writing his name? The second endorsement imposes no obligation.

1st. He contended that the defendant was liable as guarantor; cited 2 Selwyn N. P. 63; 2 Bail. 5.

2d. Can the defendant be charged as drawer? cited 2 Bail. 611; 1 Ld. Ray. 744; 5 Byles on Bills, in 14 vol. L. Lib. 16; E. 14; 1 vol. Law Lib. 25. He said 12 and 17 J. R. contained no count against a drawer. Hunt & Adams treat the liability as drawer.

The instrument declared on in the case of *Moise* vs. *Bird*, was not negotiable. 4 Pick. 311; Bail. on Bills, 44. *Flint* vs. *Day*, 9 Vermont Rep. 345. When the party writes his name on the back of the instrument, without expressing the nature of the contract, he is considered as a joint promissor.

**Hill* vs. *Lewis*, Skin. 410. A bill payable to J. S. or bearer, is not endorsable; yet if it be endorsed, the endorser shall be charged, for every endorsement is as a new bill. 1 Salk. 125; 1 Ld. Ray. 181, 743. [*319

Curia, per O'NEALL, J. This Court concurs in the instructions given below. It is, however, *now* necessary to go more at large into the discussion of the point involved, than was done in the report.

The defendant's liability cannot be considered as arising under an endorsement. For, although he wrote his name on the back of the note, yet he had no right to direct the payment of the money to the plaintiff, to whom the maker had already promised to pay. Neither can it be regarded as a guarantee. For there was nothing in the fact of writing his name on the note, with its attending circumstances, to make it necessary to consider the case in that point of view.

The true view of this contract, is to consider it as the general undertaking of the defendant, until something is shown by him which will prevent it from being so considered. There is nothing in the words of the contract inconsistent with this view. For the words "I promise to pay" apply to every name on the paper, and I take it, that it is perfectly immaterial *where* one intending to be bound by a contract, places his name upon the paper on which it is written. His signature is merely the

evidence of his assent to be bound by the contract, and when it is found written on the paper containing the terms, it is sufficient.

In *Flint* vs. *Day*, 9 Vermont, 195, the doctrine on this subject was very well declared by the Judges, when they held that he who writes his name on the back of a note payable to a third person, not yet due, without express words to show the nature of his contract, is an original promissor.

In *Moise* vs. *Bird*, 11 Mass. Rep., 436, the note was made to Benjamin Bird to the plaintiff or his order. Before it was due, and before it was handed to the plaintiff, the defendant wrote his name on the back of it. In that case, the Court held that the defendant could not be made liable, as endorser of the note, as it was not payable to him. *J. Parker said, "what then was the effect of his signature? It was to make him absolutely liable to pay the contents of the note." And it was ruled, by the whole Court, that he was liable as an original promissor.

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In vs. , 4 Pick'g, 311, the same point was decided. *Baker* vs. *Briggs*, 9 Pick'g, 121, was on a similar note—on the Circuit and on the appeal to the Supreme Court, it was held, that the defendant was liable as an original promissor, and was rightly declared against as such.

In Massachusetts it is considered now as settled law, that when a defendant writes his name on the back of a note not yet due, payable to a third person, he will be treated as an original promissor, unless he can show that his contract was not intended to have that effect. I think the same rule must be deduced from some of the New York cases, when they come to be fully analyzed and considered.

In *Herrick* vs. *Carman*, 12 J. R. 159, the action was against the defendant as endorser. The circumstances material to be noted were, Ryan applied to L. Carman & Co., for credit, which they refused. He made his note payable to L. Carman & Co., or order, which the defendant endorsed.—Ryan presented the note, to L. Carman & Co., and obtained the goods he wanted. They sold the note to the plaintiff, at a discount, disclosing all the circumstances, but endorsing the note. The defendant was held not liable. Spencer, J , however, remarked, "had it appeared that the plaintiff endorsed the note for the purpose of giving Ryan credit with L. Carman & Co., then I should have considered him liable to them or any subsequent endorsee, and the defendant's endorsement might have been converted into a guaranty to pay the note if Ryan did not, according to the decision of the Supreme Court in Massachusetts, 3 Mass Rep., 274." *Joscelyn* vs. *Adams*, is the case referred to by Mr. J. Spencer. In that case, it was held that an endorsee for valuable consideration of a note not negotiable, may write over the name of the endorser a promise to pay the contents of the note to the endorsee, who may maintain an action on such promise. Taking the two cases together, it may be fairly inferred, that the doctrine intended to be maintained by that able Judge, Mr. J. Spencer, was that when the defendant's *act, by his knowledge and with his assent, gave credit to the maker, then that he might be treated as originally liable for the payment of the contents of the note.

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In *Tilman* vs. *Wheeler*, (17 J. R. 326,) the count was on the de-

fendant's endorsement of a similar note, as a guarantee—it was held that the plaintiff could not recover.

In *Nelson* vs *Dubois*, (13 J. R. 175,) the recovery was sustained on the third count in the declaration, which considered the plaintiff's undertaking as a guarantee. It is true that the first count was against him as maker. It does not appear to be noticed by Spencer, J., who ruled that the evidence offered to charge the defendant, and excluded on the circuit, was admissible under the third count. This reasoning, however, throughout, proves that the defendant's undertaking was original, and not collateral, and that his liability arose from the act of writing his name on the note, intending to make it good to the plaintiff. The words, "the defendant is as much holden as if he had signed the body of the note," are far from being equivocal; they plainly import that the defendant might be liable as maker.

I am aware that there are other cases in New York, which may seem to have a contrary tendency. They, however, do not, so far as I have been able to examine them, touch on the doctrine which I deduce from the cases cited.

In *Frampton* vs. *Dudley*, (1 N. & McC. 129,) the Court of this State first directed its attention to this subject. The note there was payable to the plaintiff or bearer. The defendant wrote his name on the back of the note; the declaration counted against him—first, as endorser; second, specially, that the defendant agreed to become security for the drawer, and therefore endorsed it; third, for money had and received Under these counts the Court ruled the plaintiff could not recover—holding that under the second count no sufficient consideration was stated. But the Court intimated a strong opinion, that if the defendant intended to become a party "*to the original contract*," he might in some other form be made liable. The reporters suggested the inquiry, whether he might not be made liable as drawer. In *Eccles* vs. *Ballard*, (2d McC. 388,) the Court responded to that query, by ruling that the endorser of a note *payable to bearer shall be considered as the drawer of a new bill. [*322
If I was compelled to rest this case *here*, I should think I had done enough to vindicate the decision below. For certainly the weight of authority is altogether in favor of it. Indeed the case of *Eccles* vs. *Ballard* touches the very point. For when it ruled that the endorser of a note, payable to bearer, must be regarded as the drawer of a new bill, it was upon the ground that his contract was otherwise legally inoperative. In the case before us the same result would follow, if we could not come to a similar conclusion. For to endorse a note payable to another can have no effect, if it does not make the defendant liable as the maker of the note.

The English cases will, I think, lead us to the same conclusion.

In *Hill* vs. *Lewis*, (Skinner, 410,) C. J. Holt, before a jury of merchants, and with their assent, ruled that a bill payable to bearer was not endorseable; yet, if it be endorsed, the endorser shall be charged—for every such endorsement is as a new bill. Why, it may be asked, was this ruling made? It was because the endorsement of such a bill could not have effect in its legal and technical character, and was therefore not subject to the rules governing that class of contracts, and hence the Court

was obliged to regard it as a new bill, directing the payment to the endorser of the contents of the note according to its tenor and effect.

In *Hodges* vs. *Stewart*, (1st Salk. 125,) the second point ruled was, "though an assignment of a bill payable to J. S. or bearer, be no good assignment to charge the drawer with, in an action on the bill, yet it is a good bill between the endorser and the endorsee, and the endorser is liable *to an action for the money;* for the endorsement is as a new bill." To the same effect was the ruling of the Judges in *Nicholson* vs. *Segewick*, (1 Ld Ray'd. 171;) *Tasset & Lee* vs. *Servis*, (1 Ld. Ray'd. 743–4.) These cases abundantly prove that one who writes his name on the back of a note, payable to bearer, becomes originally liable for the contents. The reason why that is the law—because otherwise no legal effect would result from the endorsement—applies forcibly to the case now in hand. A promises to pay B, or order, money, and C, in order to give him credit and to make the note good, writes his name on the back of it—unless this be regarded as a several undertaking to pay the note, it can have no legal effect from the paper itself. The object and duty of Courts is to enforce contracts, not to set them aside; and hence, unless there is something which renders it legally inoperative, it should have effect according to a fair construction. Looking to the note before us, and construing the words in connection with the names of Zealy on the face and Beaubien on the back, it is no strained or unreasonable construction to say that on the 13th of December, 1838, each of them promised to pay to George M. Stoney, or order, on or before the 1st of May next ensuing, the sum of seven hundred dollars, for value received. The motion is dismissed.

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RICHARDSON, EVANS, BUTLER, and WARDLAW, JJ., concurred.

See *Carpenter* vs. *Oaks*, 10 Rich. 19; *Ambler* vs. *Hillier*, 9 Rich. 244; *Baker* vs. *Scott*, 5 Rich. 310; *Pride* vs. *Berkley*, 5 Rich. 539; *Cockrell* vs. *Milling*, 1 Strob. 444; *Gray* vs. *Bell*, 2 Rich. 71. *An.*

THE TREASURERS, FOR JAMES MALONY, vs. WILLIAM B. BUCKNER, SHERIFF.

1. On a suggestion filed against a sheriff, (after judgment has been obtained against him on his official bond,) suggesting other breaches of his bond, he may plead double if he chooses, but he cannot traverse and demur both, to the same portion of the suggestion.
2. Whatever a sheriff does, or omits to do, in his official character as a public officer (under the Act of 1829), properly recognized, whereby damage results to another, seems to be a violation of the duties of his office, and the damage proved may be recovered under the bond. Fees improperly charged constitute such damage; but a penalty or forfeiture given to the party injured, for his more ample reparation, and for the punishment of the sheriff, seems not to be damage, but rather a chance of gain, which, by increase, the law bestows upon the sufferer; such penalty or forfeiture may be recovered against the sheriff by suit, "in which no imparlance shall be allowed," but does not constitute such a demand as may be recovered under the bond, against the sheriff and his sureties, for his breach of official duty.

Before WARDLAW, J., Beaufort, Extra Term, January, 1841.

In this case the plaintiff suggested, as a breach of the official bond of

William B. Buckner, late sheriff of Beaufort *district, his exaction [*324
on certain executions in his office against the plaintiff, of illegal costs, to the amount of $ ———, and claimed to recover the penalty of ten times the excess as allowed by the Act. The defendant pleaded the general issue, and also demurred specially, showing for cause, that this was not a matter for which the sheriff's sureties were liable, and should not, therefore, have been suggested as a breach of the sheriff's official bond. The demurrer was sustained.

From which the plaintiffs appealed, on the grounds:

1. That the cause of action was rightly suggested, as a breach of the sheriff's official bond: and,

2. That the judgment was, otherwise, contrary to law.

E. Rhett, for the motion, said the defendant pleaded the general issue and demurred. Cited 1 Saund., note, 58. The defendant cannot plead and demur both. Referred to *Treasurers* vs. *Bates*, 2 Bail. 379; 5 Bac. Abr. 447, 448, 457. Second ground. Is the exaction by the sheriff, of illegal costs, a breach of his official bond? 2 Hill, 647; 2 Brev. Rep. 229.

McCarthy, contra, said the only ground made was, that the cause of action was well stated. He contended the penalty could not be recovered under the bond. Is the sheriff liable for extortion in taking more costs than he ought?

Curia, per WARDLAW, J. A formal decision only of this case, was made upon the circuit, and a report by consent of counsel prepared for taking the opinion of this court.

It now appears that a judgment on his bond has been obtained against Buckner only, and not against his sureties; that what is called a general issue was a general traverse of the suggestion tendering an issue, that the special demurrer was a sort of special plea, in which, whilst the liability for the excess of fees exacted over the legal fees is admitted, the liability for ten times the excess is denied; that there was an order of court permitting the defendant to plead double, and that the plaintiff joined in the issue tendered by the special demurrer or plea.

*The plaintiff now objects that defendant could not both plead [*325
and demur to the same parts of the suggestion, and insists that the defendant shall not have advantage of his demurrer.

The case of *The Treasurers* vs. *Bates*, 2 Bail. 379, which first introduced or recognized, from necessity, the practice of suggesting further breaches after one judgment upon a sheriff's bond, in directing the course of proceedings, contemplates that the defendant shall plead to the suggestion, and refers to the case of *Gainsford* vs. *Griffith*, 1 Williams's Saunders, 58. By the English practice under the statute 8 and 9 W. 3, c. 11,(*a*) a suggestion is employed to set out breaches existing at the time of the judgment, and the defendant is not required to plead to such suggestion, as the plaintiff must, at the execution of the writ of inquiry, prove the breaches and recover damages accordingly; for, *further*, or subsequent breaches, a *scire facias* is employed, to which defendant pleads as to *scire facias* in other cases; but the pleading, whatever it may be, goes to the right of recovery, and after the establishment of that right, in taking the inquisition or executing the inquiry, the amount of damages is accommodated to the proof that the plaintiff may offer. In

(*a*) Not made of force here. *An.*

like manner, the practice in this State directed as to a sheriff's bond, presupposes a judgment already obtained, which is to stand as a security for the damages that may be proved, and whilst it prescribes a suggestion rather than a *scire facias* as a simpler proceeding, it allows the defendant to *plead*, because the breaches suggested will be for the benefit of a new party, and in the nature of *further* breaches, and because in the matter of the breaches, or in occurrences subsequent to the judgment, there may be good ground for the defendant to deny his liability. But suppose the defendant should make default in pleading to the suggestion, shall the plaintiff have *judgment?* That he has already, for the penalty. Shall the amount of damages, laid in the suggestion, be taken as admitted? Then there would be no writ of inquiry, but an ascertainment by confession. The true view seems to be, that the defendant cannot, by any default or error of pleading, be put in a worse condition than that of an ordinary defendant in an action of debt or bond, conditioned for the per-
*326] formance of *covenants, after plaintiff's recovery of judgment for the penalty; the facts and circumstances must be proved before a jury, who shall assess the damages accordingly. Objections to those portions of the suggestion which state the former recovery, and matters of defence subsequent thereto, are waived by neglect to plead, or improper pleading; an assignment of breach, which the Court would have held insufficient, may go to the jury, if there be no demurrer; but by no implied admission, arising from the pleading, can the defendant be held beyond his liability to such damages as the plaintiff may prove to have arisen from the breach assigned. The pleading, so far as concerns the defendant's liability for ANY breach, and as concerns matter of form, apart from the assignment of breach, should be like that to a *scire facias* upon judgment—and so far as concerns his liability for the breach suggested, and matters of form in the assignment of it, should be like that to a replication assigning breaches after a plea of performance.(*a*) As there are in this case obvious errors of pleading, and some misunderstanding exists between the counsel, the defendant is permitted to strike out all after the suggestion, and plead *de novo*, pleading double if he chooses, but not traversing and demurring to the same portion of the suggestion.

The main question presented by the appeal is as to the extent of the defendant's liability, in an action on his bond, for fees improperly exacted.(*b*) The condition of the sheriff's bond is, that "he will well and truly perform the duties of said office, as now or hereafter required by by law, during the period he may continue in said office." Act of Assembly, 1829. Whatever, in the execution of his office, or in the character of a public officer properly recognized, the sheriff may do or omit, whereby damage results to another, seems to be a violation of the duties of his office; and the damage proved may be recovered under the bond. Fees improperly charged constitute such damage; but a penalty or forfeiture given to the party injured, for his more ample reparation, and for the punishment of the sheriff, seems not to be damage, but rather a chance of gain, which, by increase, the law bestows upon the sufferer. Such penalty or forfeiture may be recovered against the sheriff by suit,

(*a*) *See Norton* vs. *Mulligan*, 4 Strob. 358; *Bank* vs. *Bowie*, 3 Strob. 442. *An.*
(*b*) *State* vs. *Yongue*, 6 Rich. 327; 1 Rich. 307. *An.*

"in which no imparlance shall be allowed," but does not *seem [*327
to constitute a demand which, under the bond, may be recovered against the sheriff and his sureties, for his breach of official duty In the case of *Lesley & Calhoun* vs. *Taggart*, decided at Columbia, December, 1841, it was held, that under suggestion upon a judgment on the bond of a sheriff, there could not be recovered the costs of suits, in case and assumpsit, by which the delinquency of the sheriff, and amount of the damages thereby occasioned, had been previously ascertained. It was there no less the personal duty of the sheriff to pay such costs, than here to pay the ten times the excess claimed; and his liability to pay costs occasioned to the plaintiff's damage more clearly apparent than any damage which is here seen to result from the neglect to pay the ten times the excess.(*a*)

With these directions a new trial is ordered.

RICHARDSON, O'NEALL, EVANS, and BUTLER, JJ., concurred.

See Sup. 146.

THE TREASURERS *vs.* W. B. BUCKNER.

Where a sheriff has no process giving him authority to receive money, a person who pays to his deputy cannot look to him. And where one, deceived by no show of authority, pays money to J. S. himself, then being sheriff, that which the sheriff had not authority to receive, J. S. personally is liable for, and not the official bond of the sheriff. But should the sheriff, having writs which authorize him to collect, exact from the debtor more than was lawfully required, even without levy, the payment is not voluntary, and it is a violation of his official bond.

Before WARDLAW, J., at Beaufort, January Term, 1842.

This was a suggestion of breach on the official bond of William B. Buckner, late sheriff of Beaufort district, a judgment having been previously obtained therefor. The breach alleged was an exaction by the sheriff, from the plaintiff, under and by virtue of sundry executions in his office, of the sum of two hundred and fifty-six dollars and thirty-two cents, over and above the amounts due on the said executions. Plea, the general issue The plaintiff *being admitted to have proved [*328
his case, the defendant moved for a nonsuit, on the ground that the exaction complained of, not having been made by actual levy and sale under the execution, was no breach of the condition of the sheriff's bond, and the motion was sustained.

From which the plaintiff appealed, on the grounds:

1. That the cause of action was rightly suggested, as a breach of the sheriff's official bond: and,

2. That the judgment was, otherwise, contrary to law.

Mr. Rhett, for the motion, cited 1 McCord Rep. 395; Cheves' Rep. 113.

McCarthy, contra.

Curia, per WARDLAW, J. This case, like another between the same parties, just decided, was heard upon a report prepared by counsel, after a *pro forma* decision on the circuit; and to the other, reference may be

(*a*) 4 Strob. 31. *An.*

had for the opinion of this Court as to the practice in suggestions after a judgment upon a sheriff's bond, and as to the general measure of liability on such bond.

What in this case is called a nonsuit, might have been better called an order to quash the suggestion.

Where a sheriff has no process giving him authority to receive, a person who pays to his deputy cannot look to him; *Chiles* vs. *Holloway*, 4 McCord, 164; and if one, deceived by no show of authority, should pay to J. S., himself, then being sheriff, that which a sheriff had not authority to receive, his recourse would be to J. S., personally, and not to the sheriff's bond. But where a sheriff, having writs which authorize him to collect, exacts from the debtor more than can lawfully be required, even without levy the payment is not voluntary; 1 McCord, 395; Cheves's L. R. 113; and the sheriff either wilfully abuses his office, or negligently or unskilfully performs his duty, so as to violate the condition of his official bond.

The order of the Circuit Court is set aside, and a new trial ordered.

RICHARDSON, O'NEALL, EVANS, and BUTLER, JJ., concurred.

See 1 McM. 310. *An.*

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*329] *F. Y. PORCHER *ads.* RICHARD CALDWELL.

1. Where the unsoundness of a slave is known to a purchaser at public sale, he cannot maintain an action on the implied warranty of soundness.
2. Where a purchaser of a slave takes a bill of sale, or written warranty, and omits to insert a clause warranting the soundness, it is a reasonable inference that no warranty of soundness was intended. The presumption of warranty, however, is not conclusively rebutted, but it is a circumstance which should always be submitted or presented to the jury.

Tried in the City Court, July Term, 1841, before his Honor the RECORDER.

This was an action of assumpsit on an implied warranty of soundness of a negro woman named *Lucia*, and the following is the testimony taken by the Recorder, on the trial of the case:

"*Thomas Ryan*, sworn, said he has seen this woman; $350 is a large price for her, if she were sound *Cross-examined*, thinks the price of $350 large, because she is at least forty-seven years of age; some at forty-five are worth less; he has had a great deal to do with negroes in the last eighteen months. *In reply*, he said he is an auctioneer, and has sold a great many negroes; his opinion is formed from the sales he has made, and from what his neighbors have made.

Dr. Waring, sworn, said he was called to see Lucia 15th March last; attended until 22d. She was laboring under suppression of urine; he directed some mild measures; returned in two hours and inserted the catheter, and found it was not what he supposed; not a wine-glass of water came from her; thought it then local irritation depending on diseased uterus; examined the mouth of the uterus, and could throw it up by putting the hand on the lower part of the stomach; her stomach was afflicted with a disposition to vomit, which confirmed his opinion as to the character of the disease. When he took out the catheter, something passed on it like matter; the woman at that time was sickly-looking; since that time she

has put on a more improved appearance; this disease is the commencement of cancer; he would not have given $50 for her; her disease will be a protracted one, and attended *with great expense, requiring frequent applications; her [*330
appearance now is to be attributed to the mildness of the weather; it will require free secretions to allay the pain. The disease is incurable; it brings the patient down to emaciation; his food is opium. There is nothing in her looks to indicate such a disease; she is delicate looking; witness notified Dr. Porcher of it; he was nor aware of the seat of the disease he knew her to be unsound; he had frequently attended her. Gadsden informed witness about that time, that a first-rate cook would be worth $500; don't think this negro worth $350 if she had been sound; he examined her two afternoons since, with Dr. North; he entertains the same opinion of her disease; the disease must have existed more than thirteen years. *Cross-examined*, he said she may live fifteen years; but her sufferings will increase, and her ability to bear them will decrease.

It was here admitted that the negro was tendered. Bill of sale dated 27th January, 1841. Here the plaintiff's testimony closed.

DEFENCE.

Dr. North, sworn, said he has seen Lucia lately; never saw her before; the disease must have existed fifteen years. She might live fifteen years, but in increasing pains; she is looking very well now; she is capable of service. A disease may exist a long time, and a patient go off by some other disease; this is not usual; it is difficult to say what may be the result of this case. *Cross-examined*, he said Dr. P. said he had never examined the woman; had attended her, but not for this disease; this disease may lay her up for a year; this is usual; she may die suddenly; this attack must have been more violent than usual, as Dr. P.'s attention was not attracted; the pain increases with the duration of the disease.

Copy inventory of Mrs. Rebecca Drayton's estate was produced, and *Lucia* included.

W. B. T. Schrowdy, sworn, said he knows *Lucia*, she belonged to Mrs. Drayton; he collected the wages of this woman from William A. Caldwell, in Mrs. Drayton's lifetime, in 1839; as agent for Mrs. D., he put her in Stock's hands for sale; *Colcock* would have given $600, if she had been willing to live with him; witness would have given *$600 for her; she was a long time in the employment of Caldwell. *Cross-examined*, he said in 1839 she left Caldwell and [*331
went to some one else.

Thomas N. Gadsden, sworn, said he was employed to sell the estate of Drayton; *Lucia* was part of it. *Caldwell* applied to him to purchase *Lucia;* he asked him $500 for her; he refused to give that, said she was unsound, and that could not be got for her. At auction the woman declared she was unsound; Caldwell bid $350; witness run her up to $395, and knocked her down to Caldwell; he refused to take her at that, but proposed to take her at his bid of $350. He said he knew the negro well, *she was unsound;* she had been in his employ; he communicated Caldwell's proposition to Dr. P.; he assented; when he told Dr. P. that Caldwell said she was unsound, he did not seem to know it; witness could have got $500 for her if she had been sound. *Cross-examined*, he said he run her up to $395, and put the bid to Caldwell; he refused to sanction this, but offered his old bid of $350. Witness said nothing at the sale about the unsoundness of Lucia; he was one of the appraisers of Mrs. Drayton's estate; nothing was said of Lucia particularly at that time."

Here the testimony closed, and his Honor charged the jury that a sound price warranted a sound article, summed up the evidence on this point, and submitted the question to them.

His Honor further charged them, that if they came to the conclusion that the full value of the negro, if sound, had been paid for her, that still this afforded but a presumption of a warranty; and submitted to them, whether the other facts in the case did not rebut that presumption. If Gadsden's testimony was to be believed, Caldwell knew that the negro

was unsound; that she had been for some time in the employment of the family; that at the sale the wench had declared she was unsound; that plaintiff bid at the sale $350 for her; that Gadsden run her up to $395, and knocked her down to plaintiff, and tendered her to him at that price; that he declined this, but renewed his offer for $350, on the ground that she was unsound, and could bring no more; that the negro was as well
332] now as she had been for the last ten years, and might live fifteen years longer. It did appear to his Honor, and he so charged, that with a knowledge of all these facts, the plaintiff, failing to demand an express warranty, ought to be regarded as assuming the risk of the result of the case upon himself, and that he had no claim for indemnity from the defendant.

The jury rendered a verdict for the full price paid for the negro.

The defendant appealed for a new trial in this case, on the grounds:

1. That there was no evidence of a warranty, expressed or implied; and that there was no evidence of notice; so that the verdict is against all the evidence in the case, contrary to law, and against the charge of the Court.

2. That the jury have found that the contract is rescinded without any evidence of a recision.

Petigru and *Lesesne*, for the motion.

McCrady, contra.

Curia, per EVANS, J. Our decisions continued through a long series of years,(*a*) fully established as settled law, that were a full price is paid for a negro, and it is afterwards discovered that the negro was diseased at the time of the sale, the purchaser may recover back the purchase money, or have an abatement in the price, according to the degree of unsoundness. This is equally the case, whether there be an express warranty or not; the law in the latter case implies a warranty from the fact that a full price has been paid. It is equally well settled, that the purchaser may recover on the implied warranty of soundness, although he has taken an express warranty of title. None of these decisions have I any disposition or intention to assail, although if the question were now made for the first time, the propriety of them might well be doubted.

The plaintiff's right to recover rests upon a presumption of law; the law, in the absence of proof to the contrary, presumes, from the fact that a full price was paid, that the seller intended to warrant the soundness
333] of the property. But this is a naked presumption, and may be rebutted by proof to the contrary, or by circumstances which may lead to a contrary conclusion.(*b*) Thus there can be no doubt that an express declaration that the seller will not warrant, effectually destroys the presumption. So, also, it has always been held, that where the unsoundness was known to the buyer, he could maintain no action on the implied warranty. Besides these, there are many other facts which although not so conclusive, go to rebut the presumption. Among these is the omission to insert the warranty in the written contract, where there is one. If the purchaser takes no written warranty he trusts wholly to

(*a*) See *Timrod* vs. *Shorlbrod*, 1793, 1 Bay. 324; *Watson* vs. *Boatwright*, 1 Rich. 402; *Stevens* vs. *Chappell*, 3 Strob. 83; *Crouch* vs. *Calbreath*, 11 Rich. 10. *Am.*

(*b*) 3 Rich. 464. *Am.*

his implied warranty, both as to title and soundness; but where he takes a written warranty of title, and omits the warranty as to soundness, it is certainly a fair argument to deduce from this the inference, that there was an absence of intention to warrant beyond what is contained in the written title.(*a*) I do not say that the presumption is conclusively rebutted by this; but it is a circumstance entitled to consideration, and should be presented always to the notice of the jury. The evidence in this case is that the disease was chronic, and had existed, the doctor thought, for thirteen years at least. Caldwell told Gadsden he knew her well, she was unsound, he had her in his service, and the woman herself declared at the sale she was unsound. If these facts are true, there can be no doubt that Caldwell took the risk of soundness on himself, and his omission to have the clause of warranty of soundness inserted in the title, would seem to lead to the conclusion that no warranty of soundness was intended or expected. But is said that everything which happened at the time of the sale is established by the evidence of Gadsden, the auctioneer, alone, and that the jury were the proper judges of the extent to which they could confide in his recollection of the facts. This is true, and if that were the only circumstance, I should be disposed to let the verdict stand, as we have done in many other cases. But there are other circumstances. It appears from the evidence of Schroudy, that she had been in the employment of Caldwell and his family, and it is a fair inference that the exisience of this chronic disease was known to him, or at least that he knew she was unhealthy, and should not have purchased without the security of a warranty. Besides this, it does not appear that the important fact, that he took a written warranty of title without a warranty of soundness, was brought to the view of the jury as one of the facts which, connected with the others, would lead to the conclusion there was no warranty intended or expected. The motion is therefore granted. [*334

O'Neall, Butler and Wardlaw, JJ., concurred.

Earle, J., absent.

(*a*) Sup. 20. *An.*

See 2 Rich. 470. Also *Wood* vs. *Ashe*, 1 Strob. 407; 3 Strob. 64. *An.*

CASES AT LAW

ARGUED AND DETERMINED IN THE

LAW COURT OF APPEALS OF SOUTH CAROLINA.

Columbia, May, 1842.

JUDGES PRESENT.

HON. JOHN S. RICHARDSON,
" JOHN BELTON O'NEALL,
" JOSIAH J. EVANS,
HON. BAYLIS J. EARLE,
" ANDREW PICKENS BUTLER.

WARDLAW J., absent, holding the Circuit Court in Charleston.

WALTER V. FOSTER *vs.* WILLIAM GAULT.

1. A constable, in the discharge of an official duty, is not bound or required by law to look beyond the process which requires him to act. If the Court issuing the process has jurisdiction over the matter in which he is required to act, it is his duty to execute the process. He is neither permitted or required to look behind it to see if the Court has done its duty, and complied with all that the law requires as a prerequisite to the issuing of the process.
2. A ministerial officer, whose duty it is to execute a process, is justifiable under that process, unless it be void, and not merely voidable.

Before EVANS, J., at Union, Spring Term, 1842.

This was an action of trover, under the following circumstances. One William Runnells sued out a domestic attachment against the plaintiff and his father, William T. Foster, for a debt under $20. The process was placed in the hands of the defendant, an acting constable of the district, *33] who seized upon and took into his possession *a mare, the subject of this action. The evidence was very satisfactory, that the mare was the property of the plaintiff. The magistrate condemned the mare to be sold, to satisfy the judgment in favor of Runnells, and the constable, in pursuance of this order, sold the mare. This was the conversion complained of,

The magistrate stated, that before issuing the attachment, he took a bond from the plaintiff, Runnells, but did not require security, as he was amply sufficient. The presiding Judge, in his report, states that "*I do*

not remember the words of the affidavit, but I think they were substantially what is required by the attachment Acts."

The jury were charged by the court, that so far as the constable was concerned, it was wholly immaterial whether there was security to the bond or not. The question was, whether the constable, a mere executive officer, was bound to look beyond the precept under which he acted.

The jury found for the defendant, and the plaintiff appealed, on the following grounds:

1. Because his Honor the presiding Judge erred in charging the jury that a magistrate's judgment and order for sale, predicated on a domestic attachment, in a case where the plaintiff in attachment had not given bond with surety, as the law directs, to indemnify the defendant, was, nevertheless, sufficient to justify the constable in selling the defendant's property.
2. Because the affidavit of the plaintiff in attachment, under which the property of this plaintiff was sold, was informal, and consequently the magistrate's order for sale void, and conferred no power on the defendant to sell the plaintiff's property.
3. Because the law and evidence entitled the plaintiff to recover.

Herndon, for the motion, cited Acts 1839, p. 29, sec. 30,(*a*) and contended that a magistrate's jurisdiction being a limited one, and having no other powers, the party should bring himself under the specific provisions of the Act; and he referred to the case of *Haigood* vs. *Hunter*, 1 McCord, 511. It is necessary, in all process issuing from an inferior *jurisdiction, that the magistrate should specify particularly the authority under which he acted, and show the facts, in order [*337 to justify the constable, and enable him to show that the magistrate had jurisdiction over the matter. Cited 1 N. & McC. 227; Chev. Rep. 5, *Devall* vs. *Taylor*.

A. W. Thompson, contra, said our constables must be protected. The constable in this matter was not required to know or look beyond the process under which he acted. The constable's office is one of rather an inferior grade, and it is difficult often to obtain competent men to fill those offices; and unless they are protected by law, no respectable and competent persons can be found to fill them.

Curia, per EVANS, J. The objections made to the verdict in this case are—1st: that the magistrate took the plaintiff's bond without security, as required by law. 2d: because there was an informality in the affidavit upon which the attachment issued. In relation to this last objection, it does appear that the affidavit does not follow *verbatim* the words of the Act of 1785, P. L. 368,(*b*) though in substance it recites a case wherein the magistrate had jurisdiction. The words of the affidavit are, "that they (the defendants) have absconded, and are about to remove their effects out of this State, or so conceal themselves that the ordinary process of law cannot be served on them." The words of the 7th clause of the Act giving the magistrate jurisdiction, are, "is about to remove, or is removing, out of the county privately, or so absconds or conceals himself that a warrant or summons cannot be served on him." In the view which this court takes of the case, it is unnecessary to express any opinion on this part of it. The defendant is a constable, and the law does not and ought not to require that he should look beyond the process which requires him to act. If the process issue from a court having jurisdiction, it is his duty to execute it. He is neither permitted or required to look behind it to see if the court has done its duty, and

(*a*) 11 Stat 18, § 18. *An.*
(*b*) County Court Act, 7 Stat. 214 § 6. *An.*

complied with all that the law requires as a prerequisite to the issuing of the process. In this case, the attachment was levied on the mare, and returned to the magistrate, who thereupon gave judgment for the plain-
*338] tiff, and ordered the sale of the property *attached, to satisfy the judgment. It was under this order the defendant, Gault, acted when he sold the mare, which was the only conversion alleged or proved at the trial. There is a wide distinction between those who issue, or procure to be issued, an irregular legal process. The magistrate might sometimes be liable—the party procuring the process to issue, would, in general, be liable—but the ministerial officer whose duty it is to execute it, is justifiable, unless the process be void, and not merely voidable. There is no pretence to say the authority under which the defendant acted was void. The case was within the jurisdiction of the magistrate. The constable was not bound to enquire as to the affidavit, or whether the magistrate had taken security to the bond.

The motion is dismissed.

RICHARDSON, O'NEALL, EARLE, and BUTLER, JJ., concurred.

See 5 Rich. 64, 478; 4 Rich. 561; 4 Strob. 290, Chev. 5; 1 McM. 264, 460. *An.*

ADDISON F. POSEY *vs.* FRANKLIN BRANCH.

Where a writ was tested on the 4th day of March, 1842, and made returnable to the 3d Monday in March next, it was *held* that the 3d Monday in March might well indicate the 3d Monday after the test of the 4th of March, 1842, or the 3d Monday next after the 4th of March.

Before RICHARDSON, J., at Abbeville, Spring Term, 1842.

This was a motion made a quash a writ or process as a nullity, under the following circumstances. The writ was tested on the fourth day of March, 1842, and made returnable to the third Monday in March next. The motion was refused by his Honor, the presiding Judge, who ruled in the case as follows: "that "the third Monday in March" might well indicate the third Monday after the test of the fourth of March, 1842, (the first Monday being the seventh of the same month, thus rejecting
*339] the word *"next," or applying it thus, "the third Monday" *next* after the fourth of March.

This construction would support the process, *ut res magis valeat quam pereat;* which ought to be the judicial aim to carry out the evident intention, to render the return legal.

The case of *Adams and Scott*, 12 Wendell, p. 218, was in point. There, the test being the seventh of July, returnable the eighth of July "next," it was construed to mean, not the eighth of July next, but the eighth of July *next* after the test of the seventh of July *instant.*"

From this decision the defendant appealed, and renewed his motion in the Appeal Court, to quash the writ, on the ground of error in the presiding Judge.

Wilson, for the motion, cited 3 Chitty Gen. Pr. 35; 3 Wils. Rep. 341, 344; 2 H. Blackstone, 845; 2 Brev. Dig. 168. 12 Wend., as referred to by the Court, Mr.

Wilson contended was no authority for this Court; cited 2 Johns. Rep. 190, *Burns* vs. *Thomas & King*; *Calhoun* vs. *Reynolds*, 1 McMullen, 304; *Harper* vs. *Scuddy*, *ib.* 265.

Percival, contra.

Per Curiam. The court concurs in the construction put by the presiding Judge, and the motion is therefore dismissed.

See 1 McM. 304. *An.*

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*W. P. THOMASSON *vs.* WM. M. KERR. [*340
THE SAME *vs.* SAMUEL BURNS.

A prisoner, confined in jail under execution or mesne process, is bound to maintain himself so long as he has the means; and where a sheriff or jailor has in his custody a prisoner, confined either under execution or final process, before he can recover pay for the maintenance of such prisoner, from the plaintiff at whose suit the prisoner is confined, he must show that the prisoner has no means of paying his jail fees, and nothing out of which he can be supported.

Before EVANS, J., at York, Spring Term, 1842.

The plaintiff is sheriff of York, and claimed a right to recover against the defendants under the following circumstances: Kerr and Burns had recovered against one John Evans, in separate actions, a large amount of money, on actions of assault and battery. Evans was about to remove from the State at the time of the committing the batteries; he was held to bail, and, after verdict, surrendered himself in discharge of his bail. This was six or seven years ago, and he has remained in jail ever since. He had in possession, at the time of his removal, fifteen or eighteen negroes, which, with the rest of his property, was left in Alabama, when he returned to surrender himself. After his surrender, he applied to be discharged on a surrender and assignment of his property; but his discharge was objected to, and refused on the ground that he had not produced the property to be delivered to the assignee, as required by the Act of 1833. In the schedule, his claim to the negroes is set down, and their price estimated at eight or nine thousand dollars. It was clearly proved that Evans had no property whatever in this State, but no account was given as to what had become of his property carried to Alabama.

These actions were to recover from each of the defendants half the jail fees for feeding Evans since the present sheriff came into office.

The presiding Judge, held "that after the decision in the case of *McClane* vs. *Haine*, the Act of 1817(*a*) was passed to provide for the maintenance of persons confined in civil cases.(*b*) By the 1st section, if the prisoner assigns his property, the assignees, out of the assigned estate, are to *pay the jail fees, and in default of that fund, the plaintiff is made liable. By the 2d section, if the prisoner refuses to assign, the [*341 sheriff is not bound to feed him. Evans's case comes under the latter provision, and if the law had remained as it was by the Act of 1817

(*a*) 3 Brev. 291. *An.* (*b*) 6 Stat. 66. *An.*

it is clear the plaintiff could not recover; but in 1839(*a*) another Act was passed. By that it is provided that whenever the prisoner has no lands, goods, chattels, or choses in action, out of which to pay his jail-fees, the plaintiff shall be liable. This Act having made provision in cases where no assignment is made for the maintenance of the prisoner, the sheriff is bound to feed him, and, as a consequence, has a right, in cases where the defendant has no lands or goods, to demand the payment of his fees from the plaintiff. In this view of the law of the case, the only question was, whether the defendant, Evans, had any such property as the sheriff was bound to look to for the payment of his fees, before resorting to the defendants in these cases. I thought he had not, and decreed for the plaintiff."

From the above decree the defendants appealed:

1. Because it is respectfully submitted that his Honor erred in holding that to enable a sheriff or jailer to recover for the board of a debtor, it is sufficient to show that the debtor has no property within the limits of the State, or within the jurisdiction of the Court.

2. Because it is respectfully submitted, that to give to the Act the construction contended for, would be to enable a fraudulent or contumacious debtor to throw his maintenance in jail on his creditors, and thereby effect his release.

3. Because, from the evidence, it was manifest that the debtor was in possession of a large estate beyond the limits of the State, and which he obstinately refuses to surrender according to law.

4. Because the testimony offered on the part of defendants, showing a large amount of property belonging to the debtor in the west, negatived the idea of his insolvency.

Herndon, for the motion, said the only question now is, is Evans released? Evans is not confined in jail because he has refused to make an assignment, but because he has refused to comply with the Act of 1833,(*b*) requiring him to
*342] *deliver his property. Cited Act 1829, p. 48, sec. 30; 1 McC. 181; 3 Hill, 294; *Bryant* vs. *Ellis*, Dudley, 71.

A. W. Thompson, contra, cited Plowden, 68; county court Act, P. L. 308: 1 Faust, 249, and Act of '97, 68.(*c*)

Mr. Witherspoon, for the motion, submitted a written argument to the court in this case, but the reporter has not been furnished with it.

Curia, per BUTLER, J. By the Acts of 1817 and 1833, a prisoner confined for debt is required both to make an assignment, and to deliver to the assignee the effects contained in his schedule, before the plaintiff can be required at all to pay his jail fees. After assignment and delivery, the plaintiff in execution or mesne process may be required to pay for the subsistence of the prisoner, provided the assignee has not enough to satisfy the same, and the prisoner himself is unable or refuses to pay, &c. In the case before the Court, the prisoner, Evans, has not complied with the requisitions of these Acts. In the first instance, it is probable that he wilfully refused to comply with the provisions, and it may be now that he is unable to do so. It must be remarked, however, that he has reduced himself to his present situation by his own contumacy, arising, perhaps, out of a deliberate design to deprive the defendants of the benefit of their recovery against him. The case of *Bryant* vs. *Ellis*,

(*a*) 11 Stat. 31, § 30. *An.* (*b*) 6 Stat. 491. *An.*
(*c*) 7 Stat. 226. *An.*

Dudley, 71, involved the question, whether, under the then existing Acts, the sheriff was entitled to recover of a plaintiff who had lodged process against the same prisoner whose case is now before the Court, the amount of his jail fees. The judgment of the Court, for the entirely satisfactory reasons assigned in it, was against the demand of the sheriff. As far as we are informed, the situation of Evans, since that time, has been in no wise changed; that is, he has neither made an assignment or surrendered his property; and but for the Act of 1839, it is conceded the sheriff would be without remedy. The sheriff's right to recover in this action depends entirely on the construction of the last Act referred to. The 30th section of the Act of 1839, page 31, is in the following words: "When any person shall be taken on mesne or final process, in any civil suit, *and from inability to pay the demand, debt or damages*, or find bail if *committed to jail, and such person *has no lands, tene-* [*343
ments, goods, chattels, or choses in action, whereby his maintenance in jail can be defrayed, the plaintiff, or person at whose instance such person shall be imprisoned, shall pay and satisfy the same; or if such person, or his attorney, shall refuse or neglect, after ten days' previous notice, to pay or give security to pay the same, when demanded, the sheriff or jailor in whose custody such prisoner is, may discharge him from confinement; provided, however, that such prisoner shall, before he be discharged, render on oath, a schedule of his estate, and assign the same."

At the time Evans was committed to jail, he had abundant means to satisfy the damages recovered by defendants; and he preferred going to jail rather than subjecting his property to the operation of a *fi. fa.* He made his own choice, and surrendered his person rather than his property. His going to jail did not arise from inability to satisfy the demands against him. At that time he left his property, to come and surrender himself in discharge of his bail; and by his voluntary imprisonment, he has deprived his creditors of the means and security which they would otherwise have had a right to resort to, in satisfaction of their recovery. For, if he had not taken off his property when first arrested; or if, after he had given bail, he had remained out of the State, these judgments would have been satisfied, either by his property or his bail bond. In the first instance, then, even under the Act of 1839, the prisoner was not in a situation to subject the defendants to liability. But in the second place, had he, at the time these actions were commenced, no lands, goods, or choses in action, whereby his maintenance in jail could be defrayed? There was no evidence that he had divested himself of the property which he had when he was committed, much less that it had been destroyed or wasted, so that it afforded no available income subject to the control of the prisoner. All that was said was, that the property was out of the State, and could not be reached by the sheriff. That may be, and still the prisoner may have abundant means at his command; he may have had regularly transmitted to him the proceeds of his crops, and have his money at interest, or in bank; and in such cases the sheriff *could [*344
no more reach it than if it was out of the State, without an order from Evans himself. The inability to pay cannot depend on the location of the property, or the peculiar form in which it may exist. The fact that a person's funds may be abroad, does not deprive him of his right to

control and command them at pleasure. They may be drawn on by bill, taken possession of by an agent, or converted into money by sale. The ability of a prisoner to pay for his subsistence, must frequently depend on his own volition to command the means in his power; and when he wilfully refuses to pay, because he does not choose to command them, this should not constitute the inability contemplated by the Act. In fact a refusal to assign and deliver, would, in general, be evidence that he had means, but which he was unwilling his creditors should have the benefit of. It would be singular, indeed, if a wealthy prisoner could compel his creditors to support him because his property happened to be in another State; and such might be the case, where one contumaciously puts his creditors at defiance, by sending his property away after his arrest. What had become of the income of the prisoner's property for the last five years? He either has it himself, or it is in the hands of agents, or the property has been destroyed. Suppose that after the ten days notice prescribed by the Act of 1839, the prisoner had been discharged, and thereupon he had filed his schedule, showing that he had large possessions in a neighboring State, or money in bank in this State, how would this be consistent with his inability to pay his jail fees? *The prisoner's ability* must not be confounded with *the sheriff's power to enforce his remedy*, for the latter must depend more upon the description than the situation of assets.

We think that the sheriff in this case was bound to have shown that Evans was unable to pay, *for the want of means*, before he could hold the present defendants liable to the demands against them; and it may be, that at the time this action was commenced, Evans's means were entirely wasted or destroyed by the act of God, or by the wilful acts of others, without any fault on his part. And if so, the sheriff ought not to be compelled to support him, but might be authorized to discharge him
*345] under the *Act, or to compel the parties to this suit to pay the prisoner's board; for although the prisoner's contumacy should give him no advantage, it should not subject the sheriff to prejudice. It would seem to be paradoxical that any one should be compelled to support another when he is abundantly able to support himself. As far as we can see, this is Evans's situation; he is requiring others to feed him because he has wronged them, and does not choose to support himself. It may be, however, that he is entirely without means; and I would not have the sheriff's right to recover pay from the present defendants, to depend so much on Evans's original ability to pay the demand for which he was committed, as upon the fact of his inability to pay the jail fees at the time this action was commenced. So long as the *prisoner can pay*, the party who committed him is exempt from liability; but when it can be shown that he is unable to do so from the want of means, then the sheriff may establish his right to recover in this action.

According to these views, we think a new trial should be granted.

RICHARDSON and EARLE, JJ., concurred.

O'NEALL and EVANS, JJ., dissented.

See 6 Rich. 233; 3 Strob. 161; 1 Hill 422; Dud. 71. *An.*

*LAMAR & DANIEL *vs.* WILLIAM R. REID.(*a*) [*346
PETER LAMAR *vs.* THE SAME.
FELIX CROSSLIN *vs.* THE SAME.

1. Writs of foreign attachment were issued against the defendant and Jane Reid, jointly—declarations against the defendant alone, suggesting Jane Reid to be the wife of defendant, *held* to be fatal on special demurrer.
2. It seems that the proper course of discontinuance, where two defendants have been joined in the same writ, is by leave of the Court to discontinue. Leave to discontinue will never be refused, but it must first be obtained. This is the usual practice, and this practice has good reason—so says the Court.

Before RICHARDSON, J., at Abbeville, Spring Term, 1842.

The facts of these cases are as follows: The plaintiffs issued writs of foreign attachment in each of the above cases, against William R. Reid and Jane Reid. In their declarations they declared against William R. Reid alone, suggesting that Jane Reid was the wife of William R. Reid. To this there was filed a special demurrer, for variance between the writs and the declarations. Joinder in demurrer. The Court sustained the demurrer, and the plaintiffs appealed from the decision of the Court sustaining the demurrer, upon the subjoined grounds:

1st. That his Honor erred in holding that Jane Reid, a *feme covert*, and wife of defendant, William R. Reid, had been properly served and made a party, by process of attachment against the property of William R. Reid.

2d. Because, admitting that Jane Reid, the wife, could and had been served with process, and made a party, his Honor erred in holding that upon a writ sued out against husband and wife, a declaration against husband alone, suggesting the relation of the parties, was bad on special demurrer for variance between writ and declaration.

3d. Because the decision is, in other respects, contrary to law.

Wilson, for the motion, said, Jane Reid, being a *feme covert* at the execution of the contract, the contract itself was a nullity. He cited 4 Taunt. 468. The contract is joint and several, and Jane Reid never has been made a party to the suit. The plaintiffs could proceed without* noticing her. 1 Hill Rep. 229, [*347
Sadler vs. *McKee*. The proceeding in attachment is only to bring the defendant into Court, and make him a party; 1 Tread. Cons. Rep. 83; 2 McC. 276, Act 1792; 2 Brev. 170; as to process against partners, Act 1823, p. 34. Because there is no difference between the original writ and the declaration, in ordinary cases, it does not follow, of course, that it should not be, in cases of attachment. Chitty Plead. 52; 4 Burr. 2180; Chev. 233, 185; 1 B. & P. 49; 4 Term, 694; 3 Hill, 215; 3 Johns. 530, 531; 1 Bing. 68, or 8 C. L. Rep. 253 and 297; 17 *ib.* 309; 1 B. & P. 19; 10 C. L. Rep. 218; Harp. 215; leave to amend, *ib.* 400; 1 Peters, 46; 15 Johns, 483.

Burt, contra, cited *Fitch* vs. *Heise*, Chev. 185, and said that case was conclusive.

Curia, per RICHARDSON, J. In the case of *Fitch* vs. *Heise*, (Chev. Rep. 185,) this Court decided that where two joint(*b*) obligors had been served with the writ, and the plaintiff suggested a discontinuance as to one, and declared against the other alone, the declaration was bad upon the special demurrer.

The Court will generally give leave to discontinue, as a matter of course, yet leave must be first obtained by the usual practice; and this

(*a*) S. C. Sup. 10. (*b*) *Qu.* Joint and several. *An.*

practice has good reason. The names of men often influence the mind and bias a trial by jury; and therefore Courts guard strictly against the introduction of any but the exact legal parties to a suit at law; and whether the objection be to the withdrawal, or adding a party, the practice is the same, and has the same reason. The relative position of the litigants is not to be altered at pleasure of either party. In the case before us, the plaintiffs sued William and Jane Reid upon their note, and in attachment. The defendants gave security, dissolved the attachment, and appeared in person. The case then stood precisely as that of *Fitch* vs. *Heise*. Mrs. Reid was in Court. Afterwards the plaintiffs assumed, and the fact may have been so, that Jane Reid was the wife of the other defendant, and proceeded against Wm. Reid as if she had not been made a party; but they should have first obtained the leave of the Court before they could change the relative position of the parties made
*348] by themselves. *In many cases, much consequence might follow from the change. Notwithstanding, therefore, some cases which might indicate a different practice elsewhere, we would adhere to our own. The demurrer is consequently sustained, but the plaintiffs have leave to discontinue, as to Jane Reid,(*a*) upon paying the costs of the demurrer, and to declare against the other defendant, giving a rule to plead *de novo*.

O'NEALL, EVANS, EARLE and BUTLER, JJ., concurred.

WILLIAM JACOBS *vs.* MCBEE & ALEXANDER.

Where the sealed note of one of a partnership firm is taken for a debt due by the firm, the simple contract of the partnership is extinguished by the sealed note.

Before EVANS, J., at Greenville, Fall Term, 1841.

This was a case wherein the plaintiff attempted to charge McBee, as a partner with Alexander, in the purchase of grain. It appeared from the proof, that some grain had been delivered, and that the plaintiff had accepted and taken Alexander's sealed note in payment for the debt. The presiding Judge held, and charged the jury, "That the simple contract of the partnership was extinguished by the sealed note of one of the partners."

From this decision the plaintiff appealed for a new trial, upon the ground of error in the direction of his Honor the presiding Judge, that the sealed note of one partner is an extinguishment of the simple contract debt of the firm.

Young, *Henry* and *Wardlaw*, for the motion.

Perry and *Towns*, contra.

*349] *Curia, per* EVANS, J. There is no doubt about the general principle, that a bond or other contract under seal, will extinguish a simple contract; or, to speak more accurately, the inferior security is merged in the higher. This principle applies equally where

(*a*) See 3 Strob. 252; 1 McM. 212; 2 Hill, 422; 2 Rich., 12. *An.*

the bond of one partner is given for a partnership debt, as to other cases. But it is supposed the case of *Fleming, Ross & Co.* vs. *Van A. Lawhon & Co.* (Dudley, 361,) has established a different rule. In that case, the copartnership consisted of Lawhon & Cherry. They were indebted to the plaintiffs for goods sold. Van A. Lawhon gave a sealed note, in the name of the copartnership, for the debt. This note could not bind the firm, and therefore could operate only as the single bill of Van A. Lawhon; and the question was, whether this discharged Cherry, the other partner from his liability on the open account; it was decided that it did not. But it will be found, on examining that case, that it was decided on the ground, that as the single bill delivered to the plaintiffs was apparently, but not really, the obligation of both parties, the idea that it was the deed of Lawhon alone was not entertained by either party, and no inference could be drawn that the plaintiffs supposed they were discharging Cherry from the debt, or that the single bill would have that effect. It is conceded in that case, that if the plaintiffs had taken the specialty of Lawhon alone, and discharged the simple contract debt which they held against Lawhon & Cherry, there can be no doubt that the account would have been extinguished. That that case was not intended to overrule, but to take cases of that description out of the operation of the general rule, is manifest by what is said by my brother Butler, in delivering the opinion of the Court. Referring to certain cases decided in the Supreme Court of North Carolina, he says: "These cases are decided on the principle, that the creditor who takes the bond of one partner in the name of the firm, does so in reference to liability of the firm at the time, and does not take the bond as exclusively relying on it as his security for indemnity." At the time this case was decided, the valuable reports of the decisions of the Supreme Court of North Carolina, by Mr. Devereux, were not before us; we had only an abstract of the case. Since that time, *these reports have been added to our library, and on inspecting the cases, they are not found to go the [*350 whole length supposed; but I see no reason to doubt the correctness of the decision in *Fleming & Ross* vs. *Van A. Lawhon & Co.* The single bill in that case was clearly intended to bind Cherry. The plaintiffs did not intend to release him, and when he repudiated this act of Lawhon, there can be no reason assigned why he should not have been still liable on the simple contract. In this essential particular, that case differs from this. Here, the plaintiffs took the single bill of Alexander alone. The case comes clearly within the general and recognized principle, and is in no way affected by the exception made in the case of *Fleming & Ross* vs. *Van A. Lawhon & Co.* The motion is dismissed.

O'Neall and Butler, JJ., concurred.

Earle, J., absent at the argument.

[r] See 1 Rich. 111; 7 Rich. 395, 117. Dissenting opinion of Wardlaw, J., in *Union Bank* vs. *Hodges & Smith*, 11 Rich. *An.*

Moore & Nesbit vs. Isaiah Kelly.

1. A levy upon sufficient personal property is *prima facie* evidence of satisfaction.
2. Where personal property had been levied on (ten years before,) of the defendant's, and, by the direction of the plaintiffs, the sheriff did not advertise and sell, the plaintiffs will not be permitted to claim money arising from other sales of the defendant's property under junior executions. Their lien upon other property of the defendant is suspended until the first levy is disposed of and found insufficient. Neither can it be restored by their own act in releasing the levy, after the levy and sale under the junior execution.

Before Earle, J., at Laurens, Spring Term, 1842.

This was a rule upon the Sheriff of Laurens, for not paying to the plaintiffs money arising from the sale of the defendant's property under a
351] junior execution. The execution of these plaintiffs was lodged in Spartanburg, in December, 1828, and in June, 1829, was levied by the Sheriff there, on two horses, as the property of the defendant. The plaintiffs directed the Sheriff not to advertise until further orders. In February, 1831, the defendant paid to the plaintiffs thirty dollars of the debt, within a mere trifle of the amount due, and about the same time paid part of the costs. No further proceedings were had on this execution. In 1841, judgment was obtained, and execution lodged, against the defendant, in Laurens, under which the Sheriff made the money, by sale of the defendant's property, and these plaintiffs, in December, 1841, released the levy under their execution in Spartanburg, and claimed the proceeds of the sale in Laurens. Rule discharged.

From the foregoing judgment of the Court, the plaintiffs appealed and renewed their motion in the appeal Court.

Sullivan, for the motion.

Irby, contra.

Curia, per Earle, J. It is very well settled that an execution once levied upon sufficient personal property, is to be regarded as satisfied until the levy is disposed of (*a*) *Mazyck & Bell* vs. *Coil*, 2 Bail. 101. In *Clerk* vs *Withers*, Lord Raymond, 1072, Gould, J., said, "the defendant by this seizing of his goods in execution, is discharged of the judgment;" and Holt, Ch. J., said, "the defendant may plead 'levied by *fi. fa.*' in bar to an action on the judgment." And this would be true, although the sheriff might waste the goods or misapply the money. If the action here had been upon the former judgment as a new cause of action, the plaintiffs would doubtless be permitted to prove that the horses levied on were not sold by the sheriff, but were, in fact, restored to the possession of the defendant himself, and thus rebut the presumption of satisfaction arising from the levy. Here the attempt is by rule to obtain funds which the sheriff has made by the sale of other property, upon an execution lodged more than ten years after that of the plaintiffs. By the levy of their execution on two horses which we are to presume, until the
*352] contrary appears, was enough to pay their debt, as that *with the interest and costs, did not much exceed thirty dollars, their lien upon

(*a*) See *May* vs. *Hancock*, MS. Dec. 1829; 1 Rice's Dig. 303, § 47. *An.*

other property of the defendant was suspended until the horses were disposed of and found insufficient. Nor could it be restored by their own act in releasing the levy, after the levy and sale under the junior execution. The plaintiffs suspended the sale, by directing the sheriff not to advertise; but they still retained their hold upon the property under the levy, and if their execution is not satisfied, may proceed to retake it, if they can. Motion refused.

RICHARDSON, O'NEALL, and EVANS, JJ., concurred.

THE PRESIDENT AND DIRECTORS OF THE BANK OF SOUTH CAROLINA *vs.* OLIVER SIMPSON.

Where a party (*defendant*) is temporarily absent from the State, and a copy writ, with a notice endorsed thereon, is left at his residence during his absence, it was *held* to be a good and valid service of such writ.

Before RICHARDSON, J., at Edgefield, Spring Term, 1842.

This was an application to set aside the service of a writ. Motion granted, and service ordered to be set aside, upon affidavits of the absence of the defendant from the State until after return day. Defendant stated in his affidavit, "that on the 15th of February, 1842, he left his residence, in Edgefield, on a visit to North Carolina, and remained in North Carolina till the 16th of March, 1842, when he again entered the State, and reached home on the 20th of March, and on the 22d was handed the copy writ by a servant. Defendant also states that he understands this action is brought against him as bail of Wiley Milton, *who left [*253 the State insolvent, and now resides in Dallas county, Alabama, and that he has not had time to procure and surrender said Milton in his own discharge. The defendant states that he has been surprised, and conceives himself in danger of being injured. Defendant also states that he did not leave home with the view of avoiding legal process, and that he has no white member of his family." Defendant afterwards made another affidavit, in which he stated, "*that he meant to say in his first affidavit that he had no wife or children residing with him, nor any other white person having authority to attend to any such matters as his affidavit alluded to.*" Defendant admitted in the second affidavit, that there were three white persons about his house but not in his employment.

S. B. Mays, deputy sheriff, stated, by way of affidavit, that on the 3d of March, 1842, he left a copy of this writ at the house of the defendant, and that at the time there were three white persons present, viz.: Belk, O'Hallowell and Garrett, and informed them that he had left the writ, and that soon after he left the house he received a note from Garrett, by the hands of O'Hallowell, desiring to know something about the writ in this case. He states that Wiley Milton lived within three or four miles of defendant for several years before his removal.

R. R. Hunter swore that O'Hallowell had been living for the last three or four months at the defendant's, and that since Wiley Milton had given the bail bond, till his removal, he had lived within a short distance of Oliver Simpson.

The plaintiff appealed, and moved to reverse the order setting aside the service of the writ, on the following grounds:

1. Because service by copy, left at the notorious place of residence of the defendant, is good and legal service.
2. Because the casual absence from the State, of the defendant on return day, is not a ground for setting aside the service of the writ, inasmuch as he returned immediately thereafter, and before the first day of the term.
3. Because the service of the writ is legal.

*354] *Burt*, for the motion, cited 3 Statutes at Large, 118; 1 McCord, 566; 3 *ib.* 84.

Carroll, contra, cited 2 Statutes at Large, 611–13; Preamble of the Act of 1713; Act of 1720, 3 Statutes at Large, 118; Act of 1791; 2 McCord, 250, *Williamson* vs. *Cummin.*(*a*)

Curia, per BUTLER, J. There seems to be no doubt that the writ was left at the defendant's residence, in the manner prescribed by the Act of 1737; (*b*) that is, it was put in an obvious part of the house, by the deputy sheriff, with a notice to a white man residing there in the absence of the defendant, but not present at the time that it had been so left; and it is equally certain that the defendant got possession of the writ before Court, and when he had an opportunity to enter his appearance. The question arises on the construction of the Act of 1720,(*c*) whether the defendant falls within that description of persons who may be served with process in their absence, by having a copy left at their residence. That Act provides, "that in case the defendant absconds, or absents himself so that he cannot be found, the sheriff may serve him by leaving a true copy of such writ at the dwelling house, or the most usual and notorious place of the residence or habitation of the defendant, with a proviso that the Act shall not be construed or extended to any persons gone off from this settlement, and not being actually resident in the same when such copy shall be left," &c. The proviso shows that all persons retaining residences in the State are liable to the provisions of the Act. Neither the duration or place of absence is limited or designated, nor could they well be. It has, however, been repeatedly decided, that the fact of a defendant being out of the limits of the State, at the time of such service, will not be sufficient to set it aside. In the case of *Frean* ads. *Crookshank*, 3 McCord, 85, the defendant was in New York at the time the copy was left; and in another case, 1 McCord, 566, the defendant was in Georgia. Yet in both these cases the service was held good; and if it had appeared that the defendants did not receive the copy until after return-day, the case before the Court could not be distinguished from them.
355*] That was a circumstance which *did not seem to have been regarded important, as it is not adverted to; nor do I think it can make any difference, for, whether absent from home in the State or out of it, the notice, constructive notice, would be the same. Territorial position cannot change the nature of the notice. It is true, a sheriff cannot serve a party personally by delivering process to him in another State or district; for he must act within his own jurisdiction, to make his acts valid; and when within his own district, he leaves process at a defendant's house during his absence, but with an intention to return, it is made as good as personal service by the provisions of the above Act, the residence being substituted for the person. And if it were not so,

(*a*) 7 Stat. 263, § 6. *Am.*
(*b*) 7 Stat. 190, § 5. *Am.*
(*c*) 3 Stat. 118. *Am.*

plaintiffs would be subjected to great delay, and in some instances their cause of action might be entirely defeated. There can be little danger in holding that in all cases of temporary absence, a defendant may be served by copy left at his house, whilst the contrary doctrine would operate unequally, and interfere with valuable rights; for in cases of hardship and injustice, as is suggested by Judge Johnson in the case quoted, the court can give the party relief, by either letting him enter an appearance before judgment, or opening the judgment to allow him an opportunity to make a defence. The defendant in the case before the court, had a right to enter his appearance without leave of the court, or consulting the opposite party. The difficulty in which he finds himself involved, arises out of his relation to Milton, and not out of any unfairness or irregularity in the service of the writ. He cannot well complain of either ignorance or surprise. We think the circuit decision should be set aside. Motion granted.

O'NEALL, EVANS and EARLE, JJ., concurred.

See 11 Rich. 20. *An.*

JACOB B. BANKS *vs.* PLEASANT SEARLES. [*356

A note given in part as compensation, and partly to compromise a prosecution for an assault and battery, is not void, the consideration being adequate to sustain the action.

Before O'NEALL, J., at Edgefield, January, Extra Term, 1842.

This was an action of assumpsit on a note of hand. The defendant relied on the defence that it was given to compound a criminal prosecution. It appeared that the plaintiff had been badly beaten by a man named Yancey Freeman. The defendant, with others, was charged with being concerned in the affray. Indeed, the defendant was supposed to be the agitator of the whole affair. The plaintiff procured a warrant to be issued against all supposed to be concerned, including the defendant, and was about suing out a writ in trespass, when, at the instance of the defendant, the whole matter was compromised, and the defendant gave his note for $200. The defendant was allowed to go into an investigation of the fight, and to show, if he could, that he was wholly unconnected with it. In this, however, he certainly failed, for the proof was abundant to show, that if he did not cause the assault and battery to be committed, he was at least a party to it. The jury were told, if the note was given to compensate the plaintiff for the injury he received, and the defendant was concerned in the assault and battery, that notwithstanding it might have been also agreed that the prosecution should stop, yet the note might be recovered. If the defendant was wholly unconnected with the assault and battery, and the note was given to compromise the prosecution alone, then it could not be recovered.

The jury found for the plaintiff, and the defendant appealed on the annexed grounds:

1. That the note in this case, having been given to compromise a criminal prosecution, was void, for want of consideration.

2. Because the note, in any point of view, was void, as part of its consideration was the compromise of the criminal prosecution.

*357] *Griffin*, for the motion, cited 2 Hill, 625; 1 Bail. 588; Chev. 178, *Scott* vs. *Gillman*; 3 Taunt. 226; Chitty on Bills, 98, *in a note;* Bail. on Bills, 563; Chitty on Contr. 51, 536; 15 Pick. 529; 7 Term, 197.

Burt, contra, contended that the consideration of the note was sufficient. He said an indictment for an assault and battery could scarcely be considered a criminal prosecution. He cited 2 Hill, 625, and relied upon this case as full authority.

Curia, per O'NEALL, J. In this case we concur in the instructions given by the judge below to the jury. There is in every assault and battery a public offence and a civil injury. The compensation of the latter has always been encouraged by the imposition of a much less punishment, where it has been made than would have been otherwise done. Indeed, it is not regarded as of any great importance to the public, that common assaults and batteries should be severely punished. It is generally supposed, if the parties be reconciled, and compensation to the party injured is made, that all the ends of justice have been answered. If, therefore, the defendant was liable to answer for the injury which the plaintiff sustained, he will be regarded as making his note the measure of damages; and hence it could not be assailed as in the whole or in part resting on an illegal consideration. The jury have found that the defendant was answerable for the assault and battery, and according to the rule stated, his note must be sustained. The three cases previously decided in this State on this subject, I regard as perfectly reconcilable with each other, and as sustaining the rule laid down in this case. In *Corley* vs *Williams*, 1 Bail. 588, the indictment was against Kirksey, for an assault and battery. The defendants were his securities; he absconded. To compromise the matter, and stop the prosecution, they gave their notes for twenty-five dollars each, and the magistrate gave up their recognizance. It was held that the whole consideration of the notes then was to stop the prosecution, and therefore illegal. This was the only view which could be taken of that case, for the defendants were in no shape liable for the civil injury; they were alone connected with the criminal prosecution. So *358] *in *Hearst* vs. *Sybert*, Chev. 177, the note was given by a third person to a mother, for an assault and battery on her child, where there was no allegation that the battery was so enormous as to deprive her of his services, and where it was given to prevent a prosecution, it was held that the note could not be recovered, because the mother had no right of action for such an assault and battery on her child. This was placing the defendant's exemption from liability on the ground that there was no consideration, not that it was illegal. In *Mathison & Kingsley* vs. *Hanks*, 2 Hill, 625, the defence was, that the note was given in satisfaction of an assault and battery committed by the defendant; it was held that it was a good consideration. This case settled, as I conceive, the rule that where the defendant is liable for the assault and battery, a note given by him to settle it is founded on a legal consideration. The motion is dismissed.

RICHARDSON, EVANS, EARLE, and BUTLER, JJ., concurred.

See *Hudson* vs. *Brown & Smith*, 11 Rich. *An.*

*Hugh Muldrow, assignee, *vs.* N. A. Bacot et al. [*359

1. Every prisoner in execution is entitled to the prison bounds, on his giving to the sheriff security to remain within them, and to render a schedule on oath within forty days; provided, if he intends to take the benefit of the insolvent debtors' Act, passed in 1759, he or she has not been in actual confinement forty days.
1. Whenever the prisoner intends to take the benefit of either of the said Acts, if he has the privilege of the bounds, he must, according to his bond, render a schedule on oath.
3. Where the prisoner renders in a schedule on oath, of his whole estate, he has the right to apply for a discharge, under either of the said Acts. If he applies for a discharge under the Act of 1788, he need file no petition, but the *Clerk* is required, within ten days after the receipt of the schedule, to give notice that the prisoner will be discharged, and the schedule assigned, unless satisfactory cause to the contrary be shown before one or more of the Judges of the Court from whence the process originates, or one of the Commissioners of special bail.
4. It is the duty of the Clerk to give the notice, and it must be done within ten days after the filing of the schedule; but the notice must be given on the application of the prisoner. He must elect, and not the Clerk. The insolvent debtors' Act requires the application to be made by petition; the other Acts require no petition.

Before Wardlaw, J., Darlington, Spring Term, 1842, who reports the facts as follows:

"Debt upon prison bounds' bond, which, besides the usual conditions, contained also the following words: "and shall assign his schedule, according to law," which were intended to make it conformable to the requisition of the Act of 1841,(*a*) which extends the bounds of prisons. Breach alleged, that the defendant had not made an assignment of his property at the expiration of the time allowed by the prison bounds' Act.

The debtor was arrested under *ca. sa.*, and soon afterwards, (viz.: 29th January, 1842,) filed in the clerk's office a schedule of his whole estate, accompanied by his oath of its truth. The schedule contained no other direct intimation of its purpose. The clerk, without remembering any particular directions given to him, said that he posted a ten day rule; but the rule not having been produced, nor accounted for, objection to proof of its contents was made and sustained. No petition was filed, no application for discharge was made, and no assignment was ever heard of.

The defendants contended that the condition of the bond was not such as the Act of 1841 requires; and if it were, *that the debtor might still file his petition under the insolvent debtor's Act as the [*360 schedule was as suitable to that Act as to the prison bounds' Act; and that, until the expiration of the notice which he would be required to give, under the insolvent debtors' Act, the condition of the bond would not be broken for want of an assignment. I held that the words before recited, although not apt, might be considered as a substantial compliance with the Act of 1841, so far as regards the assignment required, and that the schedule showed the debtor's purpose to resort to the prison bounds' Act, and not the insolvent debtors' Act, because it was sworn to, because it was unaccompanied by a petition, and because the

(*a*) 11 Stat. 153. *An.*

clerk was left to give the usual notice. And I held, that after the forty days mentioned in the bond, the debtor could not commence his resort to the insolvent debtors' Act.

Under my directions, the jury found for the plaintiffs the balance due on the *ca. sa.*, $35 42, and the defendants have given notice of an appeal on the annexed grounds.

After the trial, the debtor presented his petition, showing that he was under arrest by virtue of the *ca. sa.*, before mentioned, and various other writs of *ca. sa.;* that he had filed a schedule, and was desirious of the benefit of the insolvent debtors' Act, praying a ninety day rule to be published, &c. Conceiving that the validity of the proceeding would be hereafter inquired into, and would not be effected by an *ex parte* motion and that the debtor should not be hindered in his resort to a remedial statute, by any mistake which I may have made, I directed the clerk to file the petition, and to give a copy of the rule for publication."

GROUNDS OF APPEAL.

1st. That his Honor erred in charging the jury that a debtor who intends to take the benefit of the insolvent debtors' Act, is obliged to file his petition for that purpose with the clerk of the Court, together with his schedule, within forty days from the date of the bond which he has given for the prison bounds.

2d. Because that part of the condition of the bond containing these words, "and shall assign his said schedule according to law," was void, inasmuch as it
*361] was not in *conformity to the requisition of the Act of 1841, and his Honor should have so charged the jury.

3d. Because there was no breach of the conditions of the bond.

Law, for the motion, cited the Act of 1841, p. 153, extending the prison bounds; also Powell on Contracts, 395, 396, 397.

Sims, contra, on the first ground, cited A. A. 1759;(*a*) 2 Brev. Dig. 148–9; A. A. 1788, sec. 3, 4. 86;(*b*) 2 Brev. Dig. 158. As to the form of the bond, the Court will look to a substantial rather than a literal compliance with the requirements of the statute. *Juri sunt in litera; sunt in cortice.* Cited, also, A. A. 1841, 153–4; *Treasurer* vs. *Bates*, 2 Bail. Rep. 362; *Anderson* vs. *Foster*, 2 Bail. Rep. 501.

Dargan, same side, said the absence of a petition at the time of filing the schedule, is proof that the defendant intended to take the benefit of the Act of 1788. Another fact of the defendant's intention to take the benefit of the Act of 1788, and not that of 1759, is the fact that no oath or affirmation is required under the Act of '59. Cited 2 McC. 108, *Treas.* vs. *Stephens:* 1 Bail. 111.

Moses, in reply, contended that there was nothing in this case that prevented the defendant from taking the benefit of the ninety day Act. at the expiration of ninety days from the filing of the petition. Cited Act 1788, Brev. Dig. 158, 79 sec. There is no difference whether the defendant applies for discharge under the ten day or ninety day Act; if he intends taking the prison rules, he must swear and file his schedule within forty days from the date of his bond. He is not obliged to file his petition within forty days. Cited Act 1841; 3 Washington Rep. 10; 2 McC. 293.

Curia, per EVANS, J. It must be borne in mind that the defendant Bacot was a prisoner in execution on civil process, and all the observations, which I propose to make on the construction of the Acts of the Legislature applicable to this case, will be restricted to such persons. By the 3d section of the Act of 1788, P. L. 456, commonly called the

(*a*) 5 Stat. 78. *An.* (*b*) 4 Stat. 86. *An.*

prison bounds' Act, it is provided that *all prisoners in execution* *on *any civil process* shall be entitled to the benefit of the rules, bounds and limits, provided he or she shall, within forty days [*362 after being taken in execution, give satisfactory security to the sheriff that he or she will not only remain within the said rules, bounds or limits, but will also, within forty days, render to the clerk a schedule on oath or affirmation, of his or her whole estate, or so much thereof as will pay or satisfy the sum due on the execution, by force of which, he or she shall be confined.

By the 4th section, the clerk is required to give notice, within ten days after the receipt of the schedule, that the prisoner will be liberated and the property assigned, unless satisfactory cause to the contrary is shown. By the 6th section of the same Act, if any person confined on execution (unless such person has been in *actual* confinement above forty days) be determined to deliver up all his or her estate and effects, and to take the benefit of the Act for the relief of insolvent debtors, passed the 7th day of April, 1795, he or she may do so, although he or she may have given bail to the action, or not surrendered him or herself within ten days after arrest, or not presented a petition within forty days after confinement, or not been *actually* confined three months, provided he or she shall comply with the other requisites of the said Act. By the 1st section of the Act of 1759, P. L., 247, if any person be sued, arrested, or impleaded, for any debt, duty, or demand, and shall be minded to surrender all his estate towards the satisfaction of the debts wherewith he stands charged, it shall be lawful for such person, within one month after he or she shall be taken in custody, to exhibit a petition to any court of law whence the process issued against him, certifying the causes of his imprisonment, together with an account of his or her whole estate, upon which the court shall cause the petitioner to be brought before them, and also the creditor, &c., to be summoned by public notice to be given three months, &c.

By the Act of 1840,(*a*) any prisoner in execution on final process, who shall refuse for ten days to make an assignment of the estate and effects embraced in his schedule according to the order of the Judge, &c., he shall no longer be entitled to the bounds. By the Act of 1841, every *prisoner in execution, who shall take the benefit of the rules shall be obliged not only to render the schedule now required, but [*363 shall also, at the expiration of the notice prescribed under the insolvent debtors' and prison bounds' Act, respectively, assign and surrender, as far as in his power, the property mentioned in the said schedule, and in default of such assignment and surrender, the bond for the rules shall be forfeited, &c.

I have thus embodied, in this opinion, all the various Acts of the Legislature which apply to this case, in order that the provisions of them may be collected together, and the meaning more easily ascertained From a review of them, I think the following conclusions may be drawn.

1. That *every prisoner* in execution is entitled to the bounds, on his giving to the Sheriff security to remain within them, and to render a schedule on oath within forty days; provided, if he intends to take the bene-

(*a*) 11 Stat. 121. *An.*

fit of the Act for the benefit of insolvent debtors, passed in 1759, he or she has not been in *actual* confinement forty days.

2. Whenever the prisoner intends to take the benefit of either of the said Acts, if he has the privilege of the bounds, he must, according to his bond, render a schedule on *oath*. The circumstance, therefore, that Bacot, in this case, had rendered a schedule on oath, affords no criterion whereby we can determine under what Act he intended to apply for his discharge, as seems to have been supposed by the circuit Judge.

3. Where the prisoner renders in a schedule on oath of his *whole estate*, he has the right to apply for a discharge under either of the said Acts. If he applies for a discharge under the Act of 1788, he need file no petition, but the clerk is required, within ten days after the receipt of the schedule, to give notice that the prisoner will be discharged, and the schedule assigned, unless satisfactory cause to the contrary be shown before one or more of the Judges of the court from whence the process originates, or one of the Commissioners of special bail. In this case no petition was filed, and therefore, if the prisoner made any application for discharge, it was not under the insolvent debtors' Act, which requires the application to be made by petition. The Act requires the clerk, within ten days after the filing *the schedule, to give notice, but then that must mean he shall give notice on the application of the prisoner, for if the clerk is bound in all cases to give the notice, whether applied for not, then the clerk has the election, and not the prisoner, whether he shall be discharged under the one Act or the other. In this case it is contended Bacot's bond is forfeited, because he did not assign his schedule at the expiration of the ten day rule posted by the clerk. If this rule had been posted in pursuance of the application of the prisoner, then I think he had made his election to apply for a discharge under the Act of 1788, and it may be was bound to assign at the expiration of the notice, in order to save his bond. But the evidence on this point is by no means satisfactory, and was not submitted to the jury. The opinion of the circuit Judge seems, from the report, to have turned on the fact, that the schedule was sworn to, as a sufficient evidence of the election of the prisoner. In this I think he was clearly in error, and that the case may be submitted to the jury on the other point, a new trial must be ordered.

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The Court is of opinion, with the circuit Judge, that the bond was sufficient to bind the parties, so far as it was attempted to charge them in this case.

Motion granted.

RICHARDSON, O'NEALL, EARLE and BUTLER, JJ., concurred.

See *Brevard* vs. *Wylie*, 1 Strob. 41. *An.*

*JOHN LITTLEJOHN *vs.* L. D. JONES. [*365

The owner of a private ferry may so use it (although on a road not opened by public authority, or repaired by public labor,) as to subject himself to the liability of a common carrier, if he undertakes for hire, to convey across the river all persons indifferently, with their carriages and goods. But this is a question of fact, to be determined by a jury, and when once passed on by a jury, will not be disturbed, unless for misdirection in the Judge who heard the cause.

Before EARLE, J., at Laurens, Spring Term, 1842.

This was an action of trespass on the case, arising out of the following state of facts:

The defendant, living on the Enoree, has mills on the river, and owns the land on both side. He has a ferry there for his own convenience, used as an appendage to the mills and plantation. Such a ferry has been kept there by those who have owned the property for thirty years. A road leads to the ferry and mills from the main market road, on both sides of the river, which was not established by public authority, and has never been considered a public road, nor worked on as such.

On the 1st of June, 1840, the plaintiff's wagon, with others in company, returning from Charleston, laden with goods, turned off the market road, on which the ferry was broken up by the freshet, to cross at the defendant's. Whilst the plaintiff's wagon was in the act of being driven into the flat, the chain which confined it to the bank was broken, and the flat forced out into the stream. The team and fore wheels had passed into the flat, and the chain broke as the hind wheels struck upon the end of the flat, and thus prevented them from entering, and left the hinder part of the wagon suspended in the water. The team were cut loose and and two of the mules were drowned, and the plaintiff's goods were damaged in the wagon, to the amount of $650.

It was sought to make the defendant liable, on the ground of his being a common carrier. There was no proof that the plaintiff paid, or had agreed to pay, or was told he would have to pay. He relied on what was alleged to be the common use of the ferry for all who travelled that way, and the habit of the defendant to receive pay from those *who [*366
passed. It was proved that three carriages and five wagons were put over the river at this ferry the day before the plaintiff's wagon, and that for each of them the defendant received pay, saying to one person, "the charge was fifty cents," and to another, "all ferries were allowed double price in high water." Another witness proved that he had often crossed there, and always paid ferriage to some one, whoever put him over, once to the defendant himself, and once to his son. On the other hand, it was proved that the ferry was a private ferry, used only for the convenience of the mills and plantation, that no ferryman was kept there, that the miller, a negro with a wooden leg, put over such as desired, and accepted what was offered, which he kept; that lads who came to the mill frequently did the same thing, that no charge was made, but that strangers usually offered to pay, and it was usually accepted. Several persons testified that they were in the habit of crossing there, and were never charged, and never paid. It was proved that the plaintiff's party,

before they left the main road, were told that it was a private ferry, and not a public one. Several of the party did pay the defendant after crossing, to whom he said he made no charge, but who insisted on paying him for his trouble.

The jury were instructed that the defendant was liable for the damage sustained by the plaintiff, if he undertook, for hire, to convey the wagon across the stream, although at his private ferry. There seems to be no exception to the charge, and it need not be here fully stated.

Another ground of action was, that the defendant was guilty of gross negligence. It was alleged that the chain was insufficient, and that even slight diligence was not used in preparing the bank for the admission of wagons. To this it was replied, that many loaded wagons and carriages had passed the day before; and on that occasion, that the first wagon that crossed was a much larger and heavier wagon than the plaintiff's. And the charge was retorted, that the loss was owing to the want of skill and diligence on the part of the driver of the plaintiff's wagon. It was a question of fact, and submitted to the jury, with such remarks as do not appear to be found fault with, and without the intimation of any opinion on the part of the Court.

Verdict for the defendant.

*367] *The plaintiff appeals for a new trial, on the grounds:

1. Because the defendant's ferry was a public one, established by more than thirty years' use.

2. Because all the witnesses on both sides, proved that strangers had always been charged at the defendant's ferry, consequently he was liable as a common carrier.

3. Because the defendant was guilty of gross negligence, and therefore the verdict should have been for the plaintiff.

4. Because the verdict was against law and evidence.

Bobo, for the motion, contended that the keeper of a ferry, unless he advertises that he does not intend to charge, is *prima facie* understood to be responsible for losses. Either the keeper of a public or private ferry is responsible if the party crosses with the belief that he has to pay, and that the owner is responsible. He contended that inasmuch as persons had crossed this ferry the day before the plaintiff did, and the defendant received pay from them, it was reasonable that they would be charged also, and this was sufficient evidence to charge the defendant. If the defendant ever charged before this crossing, he became a common carrier, and was, therefore, liable to the plaintiff. Cited 1 N. & McC. 17; 2 *ib.* 19. If a party takes persons or goods to carry, he is presumed to charge, unless he advertises to the contrary. Cited Law of Carriers, 10.

Burt, contra, said it was a jury case, and this Court would not disturb their finding, unless for misdirection, which was not complained of.

Young, same side. Is the defendant a common carrier? Cited Story on Bail. 322. Do the acts of defendant show that this was a public employment? Referred to 2 N. & McC. 21. Thirty years' use of a ferry does not constitute it a public ferry. The plaintiff was bound to inquire before he entered the flat whether this was a public ferry and the defendant responsible. The plaintiff did make the inquiry, and was informed that it was not a public ferry. Plaintiff was advertised, and he showed, by his own acts, that he did not expect to be charged. It was a private road leading to a private ferry. It was not chartered, and only kept for private use.

*363] **Curia, per* EARLE, J. It is said by the Court in *Cohen* vs. *Hume*,(*a*) "That it is not now to be made a question whether a

(*a*) 1 M'C. 444. *An.*

ferryman is a common carrier. That has been adjudged in *Cook* vs. *Gourdine*, and recognized in *Miles* vs. *Johnson*, (1 McC. 157.")(*a*) When we look to the definition of a common carrier, one who undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place, it seems strange that it should have ever been doubted here, that the owner of a public or chartered ferry is to be regarded as a common carrier. For notwithstanding what is said by Mr. Justice Nott in *Cook* vs. *Gourdine*, I can see no real difference between the transportation of goods in a boat across a stream from bank to bank, and along a stream from one point to another. Nor does there seem to be any reason why this liability should be confined to persons who keep chartered ferries on public roads. A man may so use his private ferry, on a road not opened by public authority, nor repaired by public labor, as to subject himself to the liability of a common carrier; if he undertakes for hire to convey across the river all persons indifferently, with their carriages and goods. Whether the defendant had made himself so liable, was a question which depended upon the habitual employment of the ferry heretofore, inasmuch as there was no proof that the plaintiff paid ferriage or had agreed to pay. An express contract for payment of a specific sum was not necessary to charge the defendant, nor indeed an express contract that he should be paid any thing. It is equally clear that he was not liable as a carrier, if the undertaking was gratuitous, and so regarded by the parties. This question was submitted to the jury, upon the proof of the previous usage there—whether he had so used the ferry as to induce the common belief that he conveyed passengers and their goods for compensation? Whether he had held himself out to the world as ready at all times to convey across the stream such as traveled that road for the customary rates of ferriage? or the contrary. The ferry was an appendage to the plantation and mills; there was no appointed ferryman habitually employed; travelers from distant places usually offered pay, and it was usually accepted; but this was not considered a charge so much as a mere gratuity,* and was retained by the person who actually officiated as ferryman, instead of being [*369 claimed by the defendant or paid to him. Under such circumstances it could hardly be said that he incurred the obligation to convey across the stream all who applied and offered to pay; or that when he did undertake, he subjected himself to the liabilities of a common carrier, as a person performing the work for a reward. The Court perceives no sufficient reason to disturb the verdict of the jury, which has been found on the belief that the undertaking of the defendant was without reward. That there has been a ferry there, used by those who have heretofore owned the property, for thirty years or more, cannot help the plaintiff, if the use has been strictly private, as the jury suppose. The defendant has not set up any right by prescription, and until he does, we need not consider what he may claim. The question of gross negligence was also disposed of by the jury.

Motion refused.

Richardson, O'Neall, Evans and Butler, JJ., concurred.

See 5 Rich. 22. *An.*

(*a*) 2 N & M'C. 19. *An.*

OLIVER SIMPSON, ADM'R OF MICHAEL RYAN, DECEASED, *vs.* JOHN BARRY.

Where money has been placed in the hands of a party, as agent or bailee, with instructions, for a particular purpose, and the bailee has acted in pursuance of these instructions, the administrator of the person placing the funds, cannot sustain an action of assumpsit against the bailee, for the particular fund.

Before O'NEALL, J., at Edgefield, Extra Term, January, 1842.

This was an action of assumpsit. The facts which were brought out, without any objection as to the state of the pleadings, were as follows: The deceased was a Roman Catholic; the defendant is understood to be priest of the *same communion. The deceased some time before his death, placed in defendant's hands $170, to be deposited in one of the Augusta banks, for safe keeping, which was done. In his last illness, the defendant visited the deceased, and he directed him to keep $30 or $40 for charity, and the balance to send to his mother, in Ireland. The deceased died at the house of the plaintiff, in Hamburg, South Carolina. The defendant then was, and still is, a resident of Augusta, Georgia. He produced in evidence a power of attorney from the deceased's mother, authorizing him to collect his entire estate. The plaintiff administered in South Carolina, and arrested the defendant with a bail writ, in Hamburg. This writ was returnable to March Term, 1840. On the 8th of September, 1840, the defendant administered in Georgia.

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The presiding Judge held, that inasmuch as the fund in dispute was on deposit in one of the banks of Augusta, Georgia, the plaintiff's administration in South Carolina gave him no right to its administration; and this was more especially the case after the defendant had administered in Georgia. The counsel for the plaintiff submitted to a nonsuit, with leave to move the Court of Appeals to set it aside, which he now does, on the accompanying grounds:

1. Because the residence of the intestate being in South Carolina, drew within the jurisdiction his chattels and credits; and the plaintiff, as the administrator, was entitled to the possession of them.

2. Because the grant of administration to plaintiff, being prior in date to the grant of administration to defendant, the title to the fund in question had been fixed in the plaintiff, and could not be divested by the subsequent administration of the defendant.

3. Because the grant of administration to the defendant, after the commencement of the suit, constituted no defence, inasmuch as the case must be determined by the state of things at the commencement of the suit.

4. Because the defence of defendant should have been made by *puis darrien continuance*, and could not be made under the general issue, which was the only plea pleaded.

*371] **Carroll*, for the motion, cited and relied on Story's Treatise, 272; also from 431, 432, in a note; 7 John. Chan. Rep. 4; 1 Williams on Executors; 2 Bail. Rep. 428; Rice Rep. 314.

Griffin, contra, referred to 1 N. & McC. 237; 1 Chitt. Black. 433; Story's Con. Laws, 433, 13 chap. 2d edit.; 7 Johns. Chan. 45; 1 Ib. 153; 2 Mass.; 3 Ib. 413.

Curia, per O'NEALL, J. If it be true that the money of the deceased was deposited by the defendant in one of the banks of Augusta, Georgia, in his own name (and it is perhaps in this point of view, on a nonsuit,

that the case should be regarded,) it is then necessary to inquire whether this case can be sustained? The defendant, it must be remembered, was the agent and bailee of the deceased; he acted in precise conformity to his instructions, and it is plain that the deceased would have no right of action, unless the defendant had refused, upon demand made, to account for the fund. The present plaintiff has no other or greater rights than his intestate. The defendant could not, therefore, be regarded as debtor to the deceased, until he had in some way appropriated his money to his own use.(*a*) No demand was proved. This is enough to show that the action now under consideration cannot be sustained. It is, therefore, unnecessary to consider the effect of the two administrations in Georgia and South Carolina.

The motion is dismissed.

EVANS, EARLE and BUTLER, JJ., concurred.

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*THOMAS BRONSON *vs.* CHANEY STROUD. [*372

The parol promise of a party to pay the debt of a third person, or to sign a note with him as security, is a collateral undertaking, and void, under the statute of frauds. There is no distinction between a promise made before and after the delivery of the goods. The promise, in order to charge the party, must be in writing.

Before EARLE, J., Greenville, Spring Term, 1842.

This was a special action on the case, for refusing to give a note of hand for certain hogs, which the plaintiff alleged were sold to the defendant, or delivered to David Henning on the credit of the defendant, and on his undertaking that he would sign a note with Henning for the amount, when the same should be presented, and which he afterwards refused to do when requested.

The subjoined report of his Honor, Judge Earle, will fully explain the facts and the points made in the court below, and the questions decided by the court.

"One Black, a witness for the plaintiff, deposed that he had hogs at Greenville for sale; that Henning applied to purchase; that the plaintiff replied that he must be made safe; that Henning talked privately with Stroud, who then returned and said to the plaintiff he would be Henning's security; told him to let Henning have the hogs, stipulating the number that Henning was to get, but added that he lived some thirteen or fourteen miles off, and wished to return home that evening, and could not wait until the hogs were weighed, but directed the plaintiff, when they were weighed, to make the calculation and draw the note for amount, and let Henning sign it, and then bring or send it to him, and he would sign it with him. He said he would go in with Henning in the note for the hogs. The hogs were accordingly delivered to Henning on this understanding of Stroud. A note was drawn and signed by Henning, and presented afterward to Stroud for his signature, which he refused.

(*a*) See *Barber* vs. *Anderson*, 1 Bail. 360. *An.*

"Henning was likewise sworn, and deposed that when he was purchasing the hogs, the plaintiff said that he was requiring security of all who dealt with him; that he told the plaintiff to take the note to Stroud, expecting he would sign it; he did not know that he would do so; he
*373] *had not spoken to him for that purpose. He had dealt a great deal with the plaintiff before, and did buy of him afterwards on credit.

"A motion was made for a nonsuit, on the ground that the undertaking of the defendant was collateral, and within the statute of frauds. The question was not free from difficulty. I thought it depended on this, to whom the credit was given in the first instance. On the evidence of Black, I thought it clear that the plaintiff had refused to sell to Henning, except upon Stroud's promise to sign the note with him; the fact of taking a note from Henning proved nothing to the contrary, as it was a joint and several note, intended to be signed by Stroud, according to the agreement. And as Stroud directed the plaintiff to let Henning have the hogs, prescribed the number, and only did *not* sign the note, because he could not wait, I thought it not unreasonable to conclude that the credit was given to him alone, and that the undertaking was not within the statute. I thought that there was a difference between a promise to sign a note with Henning, which would have bound him directly for the whole amount absolutely, and a promise to pay the amount if he did not. I overruled the motion for nonsuit.

"Henning was re examined for the defendant. He told Stroud that Bronson required security from him. He had no doubt that Stroud would sign the note. Bronson retained the note he gave him, demanded and received payments on it, and finally brought suit for the balance, (in which he obtained judgment,) before this action was brought against Stroud. The other evidence offered seemed wholly immaterial. The same point was made before the jury as on the motion for a nonsuit. I instructed the jury, if they were satisfied either that Stroud purchased the hogs, or that they were delivered to Henning solely on Stroud's credit, and on his promise to sign a note with Henning, that I thought it was an original contract, not within the statute of frauds, and the plaintiff should recover; if the hogs were sold and delivered to Henning, and the credit was given to him, on his promise to give security, even with the defendant's promise to sign with him, then the defendant should have verdict.
*374] The third exception *to the charge arises out of a remark in commenting on the cases cited, of goods charged to one, and an attempt to make another liable. Here there could be no such evidence, from the nature of the article sold. The taking of the note from Henning was, in the first instance, according to the agreement, and proved nothing as to whom the credit was given. I did not say that a promise before or after delivery made any difference as to the liability of the defendant, as supposed in the fourth ground. The promise being made before the plaintiff would deliver the hogs to Henning, was a circumstance which tended to show that the credit was given to Stroud. The facts that the plaintiff returned the note, demanded payment from Henning, waited until it fell due, then sued him, before he resorted to Stroud, were calculated to lead to the opposite conclusion. The effect of these circumstances was submitted to the jury, with the general instruction above recited.

"Verdict for the plaintiff for the balance of the price of the hogs."

The defendant appealed, and renewed his motion for a nonsuit on the following grounds:

1st. Because the case made out by plaintiff was a "special promise to answer for the default or miscarriage of another person," without any "agreement," "memorandum or note thereof," being in writing and signed by the defendant.

2d. Because the proof was, on the part of the plaintiff, that the defendant had *verbally* promised to go Henning's *security* for the purchase of forty hogs, and afterwards refused.

3d. Because the proof was, that Henning *contracted* for the hogs, *purchased* them of plaintiff, they were *delivered* to him, he made use of the meat, *gave his note* for the purchase money, when it became due *paid* $160 on it, was sued for the balance, and a judgment obtained, Fall Term, 1840.

4th. Because the proof did not support the only count in the declaration, which alleged that defendant purchased the hogs for himself. For if there had been any such proof, the defendant and Henning should have been used *jointly*, *and a *separate* action against the defendant would not lie on a *joint* [*375 contract by him and Henning.

And for a new trial.

1st. Because his Honor erred in charging the jury that it was an original contract on the part of the defendant, and therefore not within the statute of frauds and perjuries.

2d. Because his Honor erred in charging the jury that Stroud, the defendant purchased the hogs himself, and that no credit was given to Henning by the plaintiff.

3d. Because his Honor charged the jury that the law applicable to the case would have been different if the plaintiff had only *charged* Henning with the price of the hogs, and not taken his note for it.

4th. Because his Honor charged the jury that the promise made by Stroud, the defendant, being *before* the hogs were delivered to Henning, made a difference, and took the case out of the statute.

5th. Because his Honor charged the jury that if they believed the testimony of Black, a witness for the plaintiff, he was entitled to recover.

6th. Because the verdict was, otherwise, against law and evidence.

Perry, for the motion, said, was the credit given to Henning or not? If Stroud was an original purchaser, the declaration could not be sustained. He cited, in support of his views of the case, 2 L. Ray. Rep. 1085; 2 T. R. 81; 1 Salk. 27; 1 Mc.C. 104; 2 L. Ray. 224; 6 Rand. 509; 1 H. Black. Rep. 120; Roberts on Frauds, 218; 1 B. & P. 158; 1 McC. 395; 8 Johns. 29; 1 McM. 280.

Young, contra, contended that the verdict should be sustained. Whether it was an original or a collateral undertaking, in either event the verdict must stand. To whom was the credit given? To whom were the hogs delivered? To Henning, as the agent of defendant. The undertaking of the defendant was original. Cited 4 Taunt. 611. If one apply to another to deliver goods to a third person, and promises to accept a bill, or promises to sign a note for the goods, this takes the case out of the statute of frauds. *The verdict in this case could be [*376 sustained on the count in the declaration for deceit.

Towns, in reply, contended that this was a collateral and void undertaking, and came clearly within the provisions of the statute of frauds. He cited Comyn on Contracts, 51. There is a difference between a conditional and absolute undertaking. 1 Comyn on Contracts, 53, 54; 1 Saund. Rep. 211, note 1; Chitty on Contracts, 202–4, 576.

Curia, per EVANS, J. From the evidence in this case, I think it is pretty clear, that but for Stroud's promise, Henning would not have got the hogs from the plaintiff, and therefore it may be said, in some sense, that the credit was given to Stroud; but that is always the case where

the creditor refuses to trust a debtor unless he is "made safe," by the promise of a third person. If a merchant says to A, I will not trust you with my goods, and thereupon B says, let him have the goods, and I will see you paid, in such case, although the goods would not have been delivered but for the promise, it has never been supposed that B was liable, without writing, if the creditor looked in any way to A for the payment of the debt; but if no credit whatever was given to A, then B would be regarded as the one to whom credit alone is given, and would be bound by the promise. The promise of Stroud was, that "he would be Henning's security," that he would sign a note "with him" for the amount. The case then, presents this question, whether a parol promise to be another's security, or to sign a note with him, upon the faith of which property is sold and delivered, is not void under the statute of frauds. The 4th section of the statute of frauds provides "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the *debt, default*, or *miscarriage* of another person, unless the agreement upon which such action be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." It is said by Chitty, (Chitty on Con., 402,) if the person for whose use goods are furnished be liable at all, the defendant's engagement, though it were the chief inducement to the plaintiff to supply
*377] the *goods, is collateral, and must be reduced to writing. It is also said in the same work, that the statute applies *if the third party be at all trusted*. The principle thus stated is well sustained by the authorities. Thus, in *Buckmyer* vs. *Darnall*, 2 Ld. R., 1085, the plaintiff declared that the defendant, in consideration that the plaintiff, at his request, would lend to one English a horse promised, that English would re-deliver the horse. At first some of the Judges doubted if this was not an original or direct undertaking; but after consultation, it was decided that the defendant was not liable on this parol agreement, because English might be sued in detinue for the horse. So, also, in *Matson* vs. *Wharham*, 2 T. R., 80, Justice Buller says, "the general rule now taken is, if the person for whose use the goods are furnished is liable at all, any promise by a third person to pay that debt must be in writing, otherwise it is void under the statute of frauds." In this case a distinction was attempted to be made between promises before delivery and after, but the Court denied there was any such distinction. These are quoted as the leading cases, in most of the cases since decided, both in England and the American States, and are so referred to in the case of *Leland* vs. *Creyon*, 1 McC., 100. In that case, Judge Gantt, delivering the opinion of the Court, says, if Leonard, to whom and for whose use the goods were delivered, was originally liable to be sued, then the promise of Creyon was collateral and void. These authorities, with numerous others which might be cited, go to establish the principle that if there be any liability on the party to whom the goods are delivered, upon which an action may be brought, the promise of a third person to pay the same debt, should be in writing. The principle is further illustrated by those cases which establish a promise to pay the debt of another, subsisting at the time of the promise; such as the case of *Corbet* vs. *Cochran*, Riley's Law Cases, 44. All these cases go on the ground that the original

debtor was wholly discharged. Unless that had been the case, the promise could not have been binding; it would have been collateral, and within the statute of frauds. What, then, was the promise of the defendant? At the utmost, it is no more than a promise to be Henning's security, as stated by the witness in one part of his *examination, or as stated in another part, to sign a note with Henning for the [*378 price of the hogs. So far as the obligee is concerned, the law makes no distinction between principal and security. He has a right to look to all, and on a joint and several contract, may hold each liable, severally, to him. But if the rule be, as I suppose, that both cannot be liable on a parol agreement at the same time for the same debt, unless they are joint contractors, if Henning was liable at all, Stroud was not. This liability was not to be exclusive, but was according to the agreement to be superadded to Henning's, by signing his name to a note to be signed also by Henning. Taking the agreement therefore as proved, and giving it the only rational interpretation which it will admit of, to wit: that if Bronson would deliver the hogs to Henning, the defendant would sign with Henning a joint and several note for the payment of the money, I can come to no other conclusion but that the promise of the defendant was not a primary, or original and direct undertaking, but was what is usually in the cases decided, called a collateral undertaking, which is not perhaps in all cases the most appropriate term to convey the idea. But if, as we are at liberty to do, (Chitty, Con., 404, and cases referred to.) we look to the conduct and acts of Bronson to aid us in the interpretation of the contract, there can be but little doubt of what was his interpretation of it. He retained the note, received part payment from Henning, treated it as his note, sued and recovered judgment on it, and never resorted to Stroud until after Henning's insolvency. As the plaintiff held Henning liable to him for the debt, then Stroud's promise was to pay Henning's *debt*, and should therefore have been in writing. If the credit had been given to Stroud, the promise would have been that he would pay the money, or give his own note for it. If such had been the fact, then he would have been liable It is supposed this is like the promise to accept a bill of exchange, which, it has been *held*, is binding, although it be by parol, (4th Taunton, 64,) but that case is in no respect like this.(*a*) The acceptor is presumed to accept a bill on the faith of the funds in his hands, of which the bill is an appropriation. His undertaking and liability is not for the debt or default of another. He, and he alone, is primarily *liable. No other is liable except on his default. His [*379 is not a promise to pay the debt of the drawer, but to apply the drawer's funds in his hands to the payment of the drawer's debt, or according to his order. I think, therefore, the verdict is wrong. There is no evidence to sustain it on the promise, and there is nothing to support the count for deceit. The only remaining question is, shall there be a new trial, or a nonsuit. There is no dispute about the facts. The case has been considered on the evidence given by the plaintiff. The facts being ascertained, the legal effect of them is a question of law as declared in the case of *Leland* vs. *Creyon*, 1 McC., 105, and it being the opinion

(*a*) See 2 Sp. 378. *An.*

of this Court, that the plaintiff cannot recover on his own evidence, a nonsuit should have been ordered on the circuit.

The motion for a nonsuit is granted.

RICHARDSON, O'NEALL, and BUTLER, JJ., concurred.

EARLE, J., (dissenting.) Nothing can be better settled, or more generally understood, than the distinction between original and collateral undertakings, with reference to the statute of frauds. Where the debt of the third person alleged to be assumed, has previously existed, it is not difficult to determine the liability of the person making the guarantee, for it must be in writing, unless the former debtor be discharged But where the debt is incurred at the same time that the promise is made, as in this instance, the liability of the promissor becomes a mixed question of law and fact. Had Bronson sold the hogs to Henning, and taken his note before the defendant's promise to sign with him, it would clearly have been a case within the statute. But the whole was a simultaneous transaction. The defendant said, "let Henning have the hogs, and I will go in a note with him for the amount." It is not an undertaking to pay if Henning should not; it is not a promise that they will jointly pay. It is a promise that he will do an act, which, when done, would have bound him at once for the whole debt. I cannot agree, therefore, that by force of its express terms, the undertaking was to become Henning's security merely; or that by any necessary implication
*380] the *credit was given to Henning, or given to both of them jointly. For when the plaintiff refused to let Henning have the hogs until defendant undertook, he furnished an equal ground to believe that the credit was given wholly to the defendant. There was no joint undertaking at all, and when the plaintiff took Henning's note, he did not thereby manifest that he gave credit to Henning alone, or jointly with the other, because he cannot otherwise claim from the defendant the performance of his engagement. When he retained the note, and accepted payment of part from Henning, he was doing what he well might do, using Henning's direct engagement in writing to pay him the money, given, it is true, after the defendant's undertaking, but certainly not superseding it. At the utmost, it was a case in which the question of liability depended clearly upon this—to whom was the credit given in the first instance? and this was properly for the decision of the jury, to whom it was submitted. The rule, as extracted from the English cases, is thus expressed in 2 Leigh's N. P., 1025. "It is a question for the jury in such cases, whether credit was given to the defendant before the debt was incurred, or to another as the principal, taking all the circumstances of the case into consideration." Such was the course pursued in *Keate* vs. *Temple*, 1 B. & P., 157, where a lieutenant in the navy was sued for clothes furnished the crew of his vessel, by a slop seller, on this promise, "I will see you paid at the pay table; are you satisfied?" There was a verdict for the plaintiff, and although the court granted a new trial (a nonsuit was not thought of,) it was upon the circumstances of the case which it was thought ought to be submitted to another jury. So in *Darnell* vs. *Tratt*, 2 Carr. & Pay., 82; an action by a schoolmaster against an uncle for the schooling of his nephew, carried to the plaintiff's

school by the boy's mother, without any instructions as to who was liable. The defendant, when the bill was sent to him, said, "quite right, I am answerable." The Chief Justice left the question to the jury, as to whom the credit was given. In *Storr et als.* vs. *Scott*, 6 C. & P., 241, in the same kind of case, where the defendant, as steward of certain races, selected at the shop of the plaintiff a gold cup, saying, "you must send the cup as usual, I suppose, to the *clerk of the course," which [*381 had been frequently done by the plaintiff before, Lord Lyndhurst said to the jury, "the question is, upon whose credit the cup was furnished?" and left it to them to say, whether the credit was to be given to the defendant, or to the clerk of the course. In *Leland* vs. *Creyon*, 1 McC., 100, where the Court ordered a nonsuit, the goods were not only charged to a third person on the plaintiff's books, but there was no promise by the defendant at all, and the attempt was made to charge him, by a memorandum on the books, made by the plaintiff himself several days after the delivery of the goods. It cannot be doubted that the defendant would have been liable upon his undertaking to accept a bill, 15 E. C. L. R. 45; or to give his own note; or I should say, also, upon his promise to endorse Henning's note, to be afterwards procured, if the article was delivered upon the credit of this promise. I cannot perceive that it makes any difference that it was a promise to sign a note with the other, if the credit was given solely to him on the faith of that promise. I admit fully, that the statute was intended to include every case of mere surety, whether the agreement to be answerable was collateral to a previous liability of the principal, or concurrent, and made at the same time with some promise or agreement creating a liability of such principal debtor. But I think there is quite enough here to sustain the verdict establishing that there was no credit actually extended to Henning, and that the hogs were delivered on the credit of the defendant.

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*The State *vs.* James Rufus Thurston. [*382

1. The defendant was a common carrier, owned a boat on the Santee, and undertook to transport cotton, from Orangeburg district to Charleston, belonging to various persons. Before reaching Charleston, and while passing down the river, he communicated his intention (to one of the hands on board) of converting the cotton to his own use. Afterwards, at "*Euchaw Creek*," in Charleston district, he consummated his previous intention, by burning a portion of the cotton and disfiguring the marks upon the other bales by patching, and had the cotton shipped on board a steamer to Charleston, and sold and appropriated the sales to his own use. Upon an indictment for grand larceny in Orangeburg district, the jury were charged by the court:

First. "That to convict the prisoner of larceny, there must be a taking and carrying away of the goods laid in the indictment, with a felonious intent, in the *district of Orangeburg.*" Second. "That when the prisoner received the goods, if he intended to deliver them in good faith to the consignee in Charleston, then his subsequent fraudulent appropriation of them to his own use could not make him guilty of larceny." Third. "If when the goods were delivered to him he received them with the intention of stealing them, then it was larceny from the beginning, as laid in Orangeburg district."

2. The prisoner was found guilty under this charge of petit larceny; and the Appeal Court *held*, upon appeal, among other things:

1st. That the jury, under the circumstances, were at liberty to infer that the defendant, at the time he received the cotton in Orangeburg, intended to steal it and convert it to his own use; and the verdict of guilty was very properly given.

2nd. That the cotton so stolen by the defendant belonged to three different individuals, and he was very properly indicted in three cases, and a conviction in one case was no bar to a conviction in the two others. The stealing of the goods of different persons is always a distinct larceny.

Before O'NEALL, J., at Orangeburg, Spring Term, 1842.

The prisoner was indicted for *Grand Larceny* in three several cases. In the first case tried, he was charged with stealing twenty-six bales of cotton, the property of Wm. Theus. The prisoner was a *common carrier*, owning a boat on the Santee. He undertook to deliver cotton to Wm. C. Dukes, Charleston, at $1 50 per bale. He received the cotton in Orangeburg district, and proceeded below the Santee Canal to Euchaw Creek, into which he put and came to anchor. This was in Charleston district. Going down the river, he disclosed his plan to appropriate the cotton to his own use to one of his hands, neighbor Garner; and on his refusal to take part with him, he said he would kill any one that might betray him. He took the bagging off three bales, and burned the cotton. With the bagging thus obtained, after cutting
*383] out the owner's brands, he patched *the bales and had them remarked W. P. by Dryden, one of his hands. He then directed Garner to deliver the cotton to Hume, at his landing on the river, and to say that a steamer would be sent for it by Snowden—which was accordingly done, and the cotton sold and the proceeds paid over to Dryden, who was sent by the defendant to receive it. After Garner was brought to the jail of Orangeburg, as a witness, the prisoner told him he was owing him a good deal of money, and if he would swear to suit him, or do as he was desired, he and his brother would make him up $300; if he did not, he (Thurston) would put him in Williamsburg jail.

The jury were instructed, that to be a larceny, of which the prisoner could be convicted, there must be a taking and carrying away of the goods laid in the indictment, with a felonious intent, *in the district of Orangeburg*. The possession was delivered to the prisoner as a carrier, and if when he received the cotton, he intended to carry and deliver it to the consignee, then his subsequent fraudulent appropriation of the cotton to his own use could not make him guilty. But if, when it was delivered to him, he *received it with the intention of stealing it, then it was a larceny from the beginning, as laid in Orangeburg district.*

The jury found the prisoner guilty of petit larceny.

In the other cases, the larceny charged in each arose out of the same transaction, but was of different parcels of cotton belonging to different persons.

The prisoner relied on the previous conviction in bar of these indictments, and contended that the whole affair, though consisting of the cotton of various owners, was only one larceny. The court thought otherwise. The evidence already reported was given in them, and the prisoner convicted in each of the other two cases of petit larceny.

The prisoner moved for a new trial in all the cases:

1st. Because no larceny was proved; the evidence making out only a breach of trust.

2d. Because the larceny, if any, was committed not in Orangeburg but in Charleston district.

And in the second and third cases especially, on the following ground:

*3d. Because his Honor charged the jury that the prisoner was liable to be convicted under the two latter indictments, after conviction under the first, notwithstanding it was proved that the goods stolen, although the several property of three different individuals, were at one and the same time, and by one and the same act, appropriated by the prisoner. [*384

4th. Because, in all the cases, there is a difference between the allegata and probata, not described as one transaction.

And the prisoner further gives notice, that a motion will be made to set aside the convictions in the two latter cases, as irregular and void.

Northrop, for the motion, said—The first and second grounds of appeal are for error in *the charge* of his Honor the presiding Judge.

The third ground may not have been presented in proper technical form at the trial, but it is apprehended that this circumstance will not affect the decision of the Court, as the question therein considered can be determined without reference to the mode in which it is introduced. Should this be deemed an objection, however, it may be rectified by supposing that special pleas in bar of *autrefois convict* to the second and third indictments were pleaded, with an averment in each to the same effect, as stated in the said third ground of appeal; and that thereupon his Honor overruled the said special pleas, ruling that the said indictments were good, and that *the offences* charged in each of them were distinct and not the same. The fourth ground appears to be only a general conclusion from the preceding, and need not be particularly referred to.

1. As to the first ground of appeal, I consider that a larceny was proved by the evidence. It is important, however, to ascertain at what time and in what place the original bailment by the owner to the prisoner (which, being a lawful delivery, rendered the first taking and subsequent possession lawful) was determined. From the report of his Honor, it appears that the prisoner *received* the several parcels of cotton from their respective owners, with directions from them, and by contract with them, that the cotton should be delivered in Charleston to their several factors. Did the prisoner at this time so *take* the goods "of another," ("*res aliena*," in the language of Bracton,) as would support the words of the indictment *felonice cepit*? Bracton and Lord Coke will be deemed authority. In 3 Inst., chap. 47, p. 107, the definition of larceny is given from the former: "*Et sciendum quod furtum est, secundum leges, contrectatio rei alienæ fraudulenta, cum animo furandi invito illo domina cujus res illa fuerat.*" In explication of which, Lord Coke says, "*first*, it must be felonious, *id est cum animo furandi*, as hath been said; and this intent to steal must be *when* it cometh to his hand or possession; for if he hath the possession of it once lawfully, though he hath *animum furandi* afterward, and carrieth it away, it is no larceny; but this receiveth some distinction, as hereafter shall appear. Secondly, it must be an actual taking, for an indictment *quod felonice abduxit equm*, is not good because it wanteth *cepit*. By taking, and not bailment or delivery, for that is a *receipt* and not a taking; and thereupon agreeth Glanvill, '*Furtum non est ubi initium habet detentionis per dominum rei.*' [*385

"But herein the law doth distinguish, for if a bale or pack of merchandise be delivered to one to carry to a certain place, and he goeth away with the whole pack, this is no felony; but if he open the pack and take any thing out *animo furandi*, this is larceny; likewise if the carrier carry it to the place appointed, and after take the whole pack *animo furandi*, this is larceny also:—for the delivery has taken its effect and *the privity of the bailment* is determined."

I have quoted the language of Lord Coke at length, because the law respecting larceny in cases of bailment, is here laid down in the simplest and clearest terms. Larceny is a crime against the *dominium* or lawful possession of personal goods; a bailment is the lawful delivery of goods by the bailor having the lawful possession

of them to another, whose possession is, therefore, lawful, and while the bailment continues, the bailee can never be said to have *taken felonice et invito domino*. The bailee could not be guilty of larceny of the goods, because *initium detentionis* was *per dominum rie*. The bailment may be determined, either by the special purpose
*386] for which the *goods were delivered to the carrier being performed,—as when they are delivered at the place agreed on by the bailor and bailee,—or where the bailee commits, pending the bailment, some *tortious conversion* of the goods in his charge. The technical reason of the rule seems to be that the possession of the bailee is in the nature of a trust, which attends the bailment so long as it continues according to the directions of the bailor. The bailor *trusts* the bailee that he shall carry his goods to a certain place; if, in the first instance, the bailee performs the contract, the trust is executed, and the bailee being no longer a trustee, the whole property and interest in the goods are in the owner, and the possession of chattels following the ownership, they are considered in his lawful possession; if, therefore, the carrier, or any one else, take them, the person so taking may be said to take the personal goods of another (*alieni*) out of his possession. If, in the second instance, the bailee tortiously convert the goods, by breaking open a package, severing a part from the whole, or doing any thing to the goods inconsistent with his relation of trustee, he is considered as terminating the trust, and with the termination of the trust, all his interest and special property in the goods which were the subject of the trust; whereupon, as above, the property in the owner becomes absolute, the possession *entirely* in him, and if the carrier or any one else take them, the person so taking may be said to *take* the personal goods of another (*alieni*) out of his possession; whereas, if the bailee, pending the trust, carries off the goods without any termination of it, either by its execution or infraction, he is only guilty of breach of trust, for having the *special* property and lawful possession as trustee, he cannot be said to *take* the personal goods of another (*alieni*) out of his possession. This explication of the rule is rendered more manifest by what Lord Coke says of "the diversity between a possession and a charge; for, when I deliver goods to a man, he hath possession of the goods, and may have an action of trespass, or an appeal, if they be taken or stolen out of his possession; but my butler or cook, that in my house hath charge of my vessel or plate, hath no possession of them, nor shall have an action of trespasse, or an appeale, as the bailee shall; and,
*387] therefore, if they steal the plate or vessel, it is larceny."—3 Inst. *108. In 1 Hale's Pleas of the Crown, p. 504, and 1 Hawk. ch. 33, secs. 5 and 7, the same positions are distinctly laid down; and Hale uses the words, "and the taking afterwards is a new taking." The reason of this distinction is sufficiently manifest, independently of technical considerations, for when a person *receives* goods from another who voluntarily places them in his charge, he is merely a passive agent—he commits no overt act by which his fraudulent intention is evinced. If the person so receiving is *a common carrier*, he is to be regarded as merely engaged in his usual avocation, and certainly not of practising upon the confidence of others by false pretentions. The bailor is bound to exercise proper carefulness in his selection of the bailee, and relies upon his general character. Hence Lord Coke's distinction between *receipt* and *taking*, is wise as well as legal, and should always be strictly observed in charging a jury on the legal character of facts upon which depend a criminal accusation.

The question here considered is fully and elaborately discussed in East's Crown Law, 2 vol. p. 695, ch. xvi. sec. 115, where several cases are examined. He says "There are, however, some tortious acts before the regular completion of a contract on which goods are delivered, which may determine the *privity* of it, and amount in law to a *new taking* from the possession of the owner." He refers to a case reported in Kelynge's Reports, pp. 81 and 82, which he considers "as putting the principle on a far different footing," and concludes his observations, (p. 697,) thus:

"But all other writers, as far as I can find, have put this case upon the same footing as Lord Hale, namely, that the privity of contract is determined by the act of breaking the package, which makes him the trespasser; in which the taking the whole or part of the contents, makes no difference, as some have supposed."

Starkie, part iv., pp. 837, 838, and Note x. (to be cited at length.)

It is clear, that when the several parcels of cotton were delivered by the owners, and *received* by the prisoner, he did not at *that time felonice cepit et asportavit rem alienam cum animo furandi invito illo domino cujus res illa fuerat.* It is also clear, that if he be guilty of larceny, he is so because he terminated the privity of the contract of bailment between himself and the owners, by the tortious conversion of the cotton, whereby he became a trespasser, and there was a *new taking;*—the new taking and trespass were immediately after the conversion, and he did *at that time* "feloniously take and carry away the personal goods *alieni*," and was guilty of larceny. And I will proceed to the second ground. [*388

II. If then it be true, as laid down in East's Pleas of the Crown, p. 695, that "to constitute larceny, there must be an unlawful *taking* and trespass, and up to the moment of his parting with the whole package his possession is lawful, and he has no unlawful possession afterwards, whereby to constitute a *new taking*, unless he break the package or some part of the commodity from the rest while it continues in his possession"—if it be true that the unlawful taking or trespass was committed immediately after the prisoner converted the cotton to his own use, and thereby terminated the bailment and his special property therein as trustee for the owners; then the larceny was not committed *before* this tortious conversion occurred, and it follows, either that there was no larceny, or that it was committed at Euchaw creek, in Charleston district.

The prisoner, therefore, should have been tried in Charleston district, and the jury should have been charged that the offence being laid to be in Orangeburg district, and proved to have been committed in Charleston district, the prisoner was entitled to his acquittal. The law is so well settled, that I will only refer to Hawkins' Pleas of the Crown, book 2, ch. 25, sec. 35, as follows: "But of whatsoever nature an offence indicted may be, whether local or transitory, if upon not guilty pleaded, it shall appear that it was committed in a county different from that in which the indictment was found, the defendant shall be acquitted;" and to Thomas' Case, in 3 Leach's Crown Laws, 634, "All offences must be tried in the proper county where they are committed." The prisoner is entitled to his acquittal on every of the indictments preferred against him in *Orangeburg district.*

Every question in this case may be considered as depending on the settlement of the doctrine, either *as laid* *down in East and Starkie above cited, or as stated in Kelynge's Reports, which is as follows: [*389

"The case was, one bargained with another to carry some packs of goods for him to Southampton, and delivereth the goods to the carrier, and he taketh them and carries them to *another* place, and there *opens* the packs, and takes the goods and disposes of them to his own use, and the question was whether that was felony or not; and though it was objected the goods were bailed to the carrier, and therefore, there could be no felony, that was agreed generally to be good law. And it was also objected, that an indictment against one that he *felonice asportavit* such goods, is not good, but it must be *felonice cepit and asportavit*, and in that case the taking was lawful; yet it was resolved that it was felony, because his *subsequent* act of carrying the goods to *another place*, and there *opening of them* and disposing of them to his own use, declareth that his intent originally was not to take his goods upon the agreement and contract of the party, but only with a design of stealing them."

Here the decision was correct, and the reasons given "because his *subsequent* act of carrying the goods to *another place*, and *there opening of them* and disposing of them to his *own use*," would have sustained the conclusion *that the bailment was determined*, and that there was then a *new taking* and trespass; and the fraudulent intent being manifest, the larceny was complete. The doctrine of "the carrier's case," as it is termed, has become settled, and has been repeatedly recognized in all criminal courts governed by the English Law. It is the pivot of this case, and must be either now confirmed or abolished. It cannot be said that the question of intention was altogether for the jury, and that by their verdict it has been disposed of. This doctrine should have been expounded to them, and they should have been charged that according to the decided cases, and the facts in evidence, the crime was not proven to have been committed in Orangeburg district, but at the place where the *new taking* occurred, and the trespass was committed.

The third ground also, respecting which his Honor distinctly ruled that there were as many larcenies as there were *owners* of the goods stolen, is also intimately connected *with the above doctrine; for if the larcenies were com- *390] mitted when the prisoner *received* the cotton, then the ruling of his Honor was altogether *obiter*, as no question could have arisen thereon. The larceny (or larcenies, according to the dictum of his Honor,) was or were manifested by the conversion with fraudulent intent, and it should be conceded at least *arguendo*, that the *criminal* acts were committed *when* the owner's marks were obliterated, and part of the cotton burnt.

III. And I now come to the third ground, in reference to which I lay down the following propositions:

(*a*) "A crime is an *act* committed or omitted in violation of a public law either forbidding or commanding it." Black. Com. iv. p. 5.

(*b*) "The King in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is, therefore, in all cases the proper prosecutor for every public offence." Black. Com. iv. p. 2.

(*c*) Crime imports intention, for "*actus non facit reum nisi mens sit rea.*" 3 Inst. 107.

(*d*) Larceny is "*secundum leges contrectatio rei alienæ fraudulenta, cum animo furandi,*" &c. Bracton, Lib. 3, fol. 150. Coke, 3 Inst. 107.

(*e*) All moveable things are either subjects of property, or they are not.

(*f*) These subjects of property are "*bona*" in the language of the law, and are distinguished as "*bona conjusdam propositi,*" (i. e.) the goods of a *certain* person proposed, or *bona alieni*, (i. e.) of another.

The terms "*alieni,*" or "of another," are used as opposite to *sui*, or of his own.

(*g*) The gist of the crime of larceny is not the personal wrong to any individual, but the taking and carrying away personal goods not the property of the thief, with the intention of stealing them.

Lord Coke, in his explication of this part of the definition "of another" merely considers it as a term of distinction from such things, as being the property of the person taking, could not involve him in the charge of larceny. The *things which may be stolen, must be subjects of property in somebody, *391] and not such things as are said to be *nullius in bonis*. The *act* of taking and carrying away with *intent* to steal, is the crime; and indeed, if the true owner of goods take them out of the possession of a carrier, with the intent to defraud the carrier of his hire, or to charge him with their value, he is guilty of larceny; for then there is the *fraudulent* taking and carrying away, which constitutes the crime.

In the question of *whose* property, it is only important to show that it was not that of the thief, except where it becomes a part of *the description* of the larceny, and then *for certainty* should be truly alleged, and proved as alleged, whether known or unknown. The particular ownership of the property is not material to the essence of the crime. "An indictment of larceny of the goods *cujusdam ignoti*, is good, for it is the King's suit, and though the owner be not known, the felony must be punished." Hale's Pleas of the Crown, 1, p. 512. Indeed, it would seem that all that is really requisite in an indictment, is to describe the goods stolen as things which are *property*, and allege that they were feloniously taken; for the allegation of stealing, implies that they did not belong to the accused, and the crime is made out if the things taken are described as chattels of value, or property. So Hale immediately after says, "An indictment *quod A verberavit B*, and 20 *jacks pretii* 20*s. felonice cepit*, &c., held good *without shewing whose they are.*" 10 Henry VIth. Greater particularity is now required in indictments, but it is apparent that the private injury is not the gist of the crime, but the offence to the sovereign or State, and which is prosecuted by public authority.

(*h*) If a person at one and the same time, at one and the same place, and by one and the same act, steal the personal goods of several different persons, he has committed but one larceny, and is liable to but one indictment, trial, conviction and sentence therefor. This position is so clear and well established, that it is of rare occurrence to find cases in which the contrary has been contended. Lar-

ceny is simply the "felonious taking and carrying away the personal goods *alieni*," whether of one or of many, known or unknown. Suppose on an indictment for stealing goods, *the property of a person or persons unknown to the jury, the defendant was acquitted or convicted; suppose the goods were so particularly described by *marks* or in any other way, that they could be designated precisely, although the ownership was not known, *pretii* $100. Suppose after defendant's acquittal or conviction, the owner or the several owners of these identical goods were to be discovered, and defendant was again indicted for stealing *a part* or *all* of these identical goods—would not his plea of *autrefois acquit* or *convict*, on proof of the identity of the goods themselves, be a sufficient plea in bar? [*392

If the position (*h*) be not sound, then, in this supposed case, the defendant would be liable to conviction for stealing, say "20 *jacks pretii* 20*s.*" the property of a person unknown, and after being punished therefor, he might be convicted of stealing 5 *jacks pretii* 5*s.*, the property of A., and after being punished therefor, he might be convicted of stealing 10 *jacks pretii* 10*s.*, the property of B., and after being punished therefor, he might be convicted of stealing the remaining 5 *jacks pretii* 5*s.*, the property of C.; for according to the rule which was laid down at Orangeburg, the indictments being all different in their allegations of ownership, the pleas of *autrefois convict* would have to be overruled. Now is it not evident, that in each of the three last cases the defendant would have been tried for the same crime for which he was convicted in the first?

The whole difficulty is occasioned because the most usual mode of *describing* goods, is by alleging the name or names of the owner or owners; and hence writers, in illustrating the nature of the pleas of *autrefois* acquit and convict, refer to the name or names of the owner or owners, as the *designation of the goods*. It matters not, therefore, whether there be one or many owners, known or unknown, so far as the essence of the crime is considered; that consists in the *act* and the accompanying *intent*. Suppose gamblers are playing round a table, and have placed their stakes, undistinguishable, as coins of the same denomination usually are, in a plate or cup, and the sum total of the stakes were taken up by a thief and poured into his pocket—is it not clear that he would have committed but one criminal act and one felony? If the game had been broken *up, the players would have had a right each to his own stake—therefore, the thief took the property of different persons, who we will suppose are gone and unknown. Suppose he had been indicted for taking the coins of a person unknown, and on evidence it appeared that one of the gamblers, unknown by name, had placed five silver dollars in the plate—and that the thief had taken *all* the money—he would be convicted; if again indicted for taking the coins of another person unknown, would he not show that he had been convicted for the *act* of stealing *all* the coins,—for those *he* stole were undistinguishable,—and that he could not be tried more than once for this offence? It is as hard to prove this position, as it is to demonstrate an axiom in mathematics. Probably authority is better in such a case than reasoning. [*393

Let it be remembered that grand and petit larceny are of the same nature, differing only in the *value* of the thing stolen.

Hale, Pleas of the Crown, vol. 1st, p. 531, says, "If at the same time he steals goods of A. of the value of sixpence, goods of B. of the value of sixpence, and goods of C. of the value of sixpence, being perchance in one bundle or upon a table, or *in one shop*, this is grand larceny, because *it was one entire felony done at the same time though the persons had several properties.*"

East's Pleas of the Crown, p. 934, in the case of *Rex* vs. *Thomas*, "on a count for uttering several forged receipts, the court will not put the prosecutor to his election on which receipt to proceed," "as the receipts were charged to have been uttered *at one and the same time*, and might constitute *only one* offence of uttering many forged receipts. And accordingly it was proved, that the several receipts there stated were forged, and were uttered at one and the same time in one bundle by the prisoner."

Leach's Crown Laws, vol. 1st, p. 538. Doran's case, per Chief Baron Eyre, "the grand jury cannot with propriety find two indictments for the same offence at the same time."

Burrows' Reports, *Rex* vs. *Benfield & Saunders*, 980. This case arose under an information filed for a libel *upon several persons*. The court "looked upon this to be
*394] one offence; the gist of the charge is *singing* of these songs in the *manner and with the intent charged in the information."

In Thurston's case, the gist of the charge is the taking and carrying away of the goods with the intent charged in the indictment.

I presume it will be conceded, that if the felonious taking and carrying away the personal goods of several persons, is a distinct offence of larceny, it cannot at the same time be contended that it is *a distinct* larceny, and also *several* larcenies. It would be like the evil spirit whose name was Legion, because *he* was *many*. It is a rule that "every count should charge the defendant as if he had committed a distinct offence;" yet the first form of indictment for larceny in Chitty's Criminal Law, vol. 3. p. 950, charges as one larceny the stealing of several different articles of property belonging to different persons. The position now contended for is not only reasonable as a logical deduction from the terms of the law, and established by the highest authority, but its converse would be iniquitous, and contrary to the spirit of our laws. When penalties and punishments are prescribed, they are considered as rods in the hands of the Roman Lictors, to be used by command of the Magistrate, and not at the caprice or enmity of a revengeful prosecutor. Can it be endured, that in such a case as this, it shall be optional with the prosecutor and Solicitor, whether the prisoner shall be subject to one or several trials and accumulated punishments? Common sense, law and humanity, are all opposed.

It seems unnecessary to make any application of the points discussed to the facts of the present case, as their relevancy is apparent.

Edwards, Solicitor, contra, did not argue the case in the Appeal Court.

Curia, per O'NEALL, J. The first and second grounds, applying to all the cases, will be considered first, and together. For if the convictions are good, it is upon the ground that the prisoner, when he received the cotton, in Orangeburg, intended to steal it, and afterwards consum-
*395] mated that act. There is no doubt, as was said to the jury, *if the prisoner received the cotton, with the intention of carrying and delivering it, according to his contract, and afterwards changed his mind and fraudulently appropriated it to his own use, he would not have been guilty of a larceny in Orangeburg district. It has been conceded here, that the act done at Euchaw creek, in Charleston district, was a plain larceny; and the only question is, whether the jury were at liberty to ascribe the beginning of the felonious intent to the time at which the prisoner received the cotton. It is plain from Garner's testimony, that on the voyage, and before he reached Euchaw creek, the prisoner communicated to him the scheme of appropriating the cotton to his own use. This, from any thing which appears, might have been in Orangeburg district, and is enough to sustain the verdicts. But I have no disposition to evade the question. For I hold that the jury were at liberty to infer, from the felonious intent manifested at Euchaw creek, where the prisoner first broke bulk, burned three bales of his load, and altered the marks of the others, and sent on the cotton to a different consignee, under a false name, that he received the cotton intending to steal it; and when they came to that conclusion in fact, they did right in finding him guilty in Orangeburg district. In the *State* vs. *Pleasant Gorman*, (2 N. & McC. 90,) Judge Johnson stated the law to be that "whatever might have been the old rule on the subject, there can be no question that, at this day, a larceny may be committed of goods obtained by delivery, from the owner, if done *animo furandi*." In another part of the case, he states the effect of the verdict to be conclusive of the question of the prisoner's

intent in receiving the goods. For he says, "that the prisoner got possession of the horse, with the stealing of which he is charged, with a felonious intention, is determined by the verdict of guilty." Putting these two principles together, it is plain, that where the jury have evidence which may or may not bring them to that conclusion, they have the right to say, from all the facts, whether the felonious intent existed *eo instanti*, at the reception of the goods, or arose afterwards. This view has the sanction of a very eminent criminal lawyer. Archbold's Crim. Plead. 187, lays down the law as follows: "If A. obtain goods, *animo furandi, or receive them, *harboring, at the time, an intention wrongfully to convert them to his own use, it is larceny.* Thus where the defendant [*396 was employed to drive sheep to a fair, but instead of driving them to the fair, he drove them in a contrary direction, and sold ten of them on the morning he received them, and *the jury were of opinion that at the time he received them, he intended to convert them to his own use: this was held to be larceny.*" This comes up so fully to the cases before us, that I will not pursue this part further. The remaining ground only applies to the two cases last tried and will now be considered. It must be tested under the plea of *autrefois convict*. The same rules apply to it, as to the plea of *autrefois acquit*. Archbold's Crim. Plead. 88, speaking of the plea of *autrefois acquit*, says, "the true test by which the question, whether such a plea is a sufficient bar in any case may be tried is, whether *the evidence* necessary to support the second indictment, would have been sufficient to procure a legal conviction upon the first." Inquire under this rule whether the evidence under the second and third cases, could have produced a conviction under the first? It is plain it could not. For in it, the stolen cotton is charged to be the property of William Theus. In the second and third, the cotton is laid as the respective property of Mack & Fogle. The property must be proved, as laid, or there can be no conviction. Hence the proof, in this respect, must be different in each case; and therefore the plea could not be sustained. In *The State* vs. *Ryan & Jones*, (4 McC. 16,) the property stolen was laid to be the "goods and chattels of A. B. &c." It appeared that a part belonged to A., a part to B., and a part to C.; it was held that the proof did not sustain the allegation. That case not only sustains the position which I have already laid down, but that the stealing of the goods of different persons is always a distinct larceny,(*a*) or *may at least be so treated by the solicitor*, if *in his discretion* he *thinks proper so to do.* The only authority which has been cited for the contrary position, is that from 1st Hale's P. C. 531. That, when examined, will be found to amount to no more than this, that several petit larcenies on different days of the goods of A.; or of the goods of A. B. & C, if committed by one and the same act, *may, in order to make *out the higher offence of grand larceny, be joined in one indictment.* [*397 The first position laid down by that great Judge and good man, Sir Matthew Hale, is, "If A. steals the goods of B., to the value of 6*d.*, and at another time to the value of 8*d.*, so that all put together exceeds the value of 12*d.*; yet this is held grand larceny, *if he be indicted of them altogether.*" The result, by the authority, is made to depend upon the

(*a*) See *State* vs. *Holland*, 5 Rich. 517. *An.*

offences being united in one indictment. It is therefore not opposed to the view, that for the goods of B., stolen at different times, different indictments would lie. Again, he says, "*it seems to me*, that if he (the prisoner) steals goods of A. of the value of 6*d*., goods of B. of the value of 6*d*., and goods of C. of the value of 6*d*, being perchance in one bundle, or upon a table, or in one shop, this is grand larceny, because it is one entire felony, at the same time, though the persons had several properties, and *therefore if, in one indictment*, they make grand larceny." This qualification again shows, that by treating the different larcenies as one act, they become one offence. But I apprehend that it never entered into the head of the learned Judge, that each of these could not be regarded as *separate petit larcenies*. For that would be in favor of the prisoner, and hence, if separated by the solicitor, the Court would have regarded them according to their intrinsic character So, if they had been grand larcenies, an indictment would have laid for each; and an acquittal in one, would not have barred the others. But the moment a conviction took place in one, it might have suspended the others, and if clergy had been allowed and the judgment of branding had been executed, then *that* operating as a statute pardon, would have discharged the prisoner from the other indictments.(*a*) 2 Hale's P. C. 254.

The motions in all the cases are dismissed.

RICHARDSON, EVANS and BUTLER, JJ., concurred.

EARLE, J., dissenting. I am not satisfied with this conviction. It is the case of a common carrier, to whom goods have been delivered to be carried to a certain place, and who thereby acquired a special property and a legal possession. To make the taking in such case before the goods
*398] are brought to the place of delivery larceny, it *should be proved that the delivery was *fraudulently procured*, with a felonious intent to convert the property so acquired. Such I have always understood the law to be; and such is stated by Mr. East, in his Pleas of the Crown, 2 E. P. C. 393, to be the result of all the cases. "It is to be collected from them," says he, "that if a person obtain the goods of another by lawful delivery, without fraud, although he afterwards convert them to his own use, he cannot be guilty of felony. As if a tailor have cloth delivered to him, to make clothes with; or a carrier receive goods to carry to a certain place, &c. But if such delivery be obtained by any falsehood, or fraud, and with an intent to steal, though under the pretence of a hiring or even a purchase, the delivery in fact by the owner will not pass the legal possession so as to save the party from the guilt of felony." The case of *Gorman*, (2 N. & McC. 90,) who by falsehood and fraud obtained the delivery of a horse as a loan, and immediately rode off in another direction and sold him, was one of this description, and the intention to convert, manifested by the falsehood in obtaining possession, made the taking larceny. But in the case before us, the cotton was delivered by the act of the owners to the prisoner, in the way of his ordinary employment, without any other procurement on his part; without any fallacious appearances, or other inducements held out to them to repose this confidence in him. There is nothing therefore to distinguish this case

(*a*) See Act of 1851, 12 Stat. 81.

from that of every other carrier who takes goods entrusted to him, before they come to the place of delivery; and then the larceny is complete only upon the actual taking, which dissolves the privity and constitutes the larceny. Now whether the taking by the prisoner was of such a sort at the time and place of its being committed, I will not inquire. But I conclude from the rule to which I have referred, that it could only be a larceny in Charleston district, where the cotton was converted. The case of four prisoners, Barnet and others, at Worcester, reported in 2 Russ. on Cr. 191, was of a similar kind, and it was held to be larceny at the place of taking. The case cited from Kelynge, 81, of the carrier who carried the packs of goods to the appointed place, and opened them and took the goods, is there put, it is true, upon the ground of an intent *originally not to take the goods upon the agreement, but only to steal them. The ground of decision, however, is put by all the other writers upon a different principle, that breaking the package dissolved the privity and made him a trespasser. 2 E. P. C. 696, 697. I see nothing in the proof here from which the jury could infer that the cotton was obtained with an intent to convert. If the rule adopted by the Court be correct, and the larceny was committed when the cotton was received, it follows that each parcel constituted a different offence. [*399

See Post, 502; 5 Rich. 244. *An.*

THE STATE *vs.* HENRY C. TURNER.

Wherever one of the counts in an indictment for trading with a slave is good, the court awards judgment upon it, notwithstanding the other counts may be bad.

Before RICHARDSON, J., at Edgefield, March Term, 1842.

This was an indictment for trading with Isom, the slave of Jonathan Wever, deceased, but under the care of J. R. Wever, (son,) and Oliver Hearn, overseer, by buying two bushels of wheat, and selling half a pound of coffee and two pounds of sugar.

The trading was proved, both by Wever and Hearn, who had purposely sent Isom with the wheat in a bag. They saw the bag carried into the lumber room of the defendant, after it had been laid for a few minutes by a fence, and heard it poured out—listened to the conversation between him and Isom in defendant's store, and saw the delivery of the coffee and sugar by him to Isom.

On the other hand: Mays and Hall, (just after Wever and Hearn had left the premises, and having been discovered by Turner,) were sent for by defendant. These *witnesses found a bag of wheat described as similar to Isom's lying near the fence, but very unlike the wheat in defendant's lumber room, and related some circumstances to indicate that Hearn and Weaver may have been mistaken, and never heard the wheat poured into a barrel, as they supposed; as Mays and Hall found no mixed wheats, and the empty barrels of the lumber room contained cobwebs, &c. The evidence in detail is annexed. [*400

Mrs. Tomkins and Mrs. Harris also supposed that Mr. Turner could have had no sugar or coffee for sale just at that time, as they could not get those articles a day or two before, and knew that Turner replenished with sugar and coffee shortly after.

The case was submitted to the jury, who found the defendant guilty.

The defendant appeals, upon grounds of fact, which must be resolved by the evidence; and moves also in arrest of judgment.

On this head, the jury were instructed, that the first count was bad; because it did not negative the fact of Isom's having a permit from any one having the care of him. But that the second and third counts were good. And, therefore, if the trading had been verified by Wever and Hearn, to their conviction, and if Isom had been under Hearn's care, as alleged in the second count, or under Wever and Hearn, as in the third count, they might find the defendant guilty accordingly.

*401] **Grounds taken in arrest of judgment:*

1. That there is no allegation in the first count in the indictment, that the

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THE STATE OF SOUTH CAROLINA, EDGEFIELD DISTRICT. } *To wit:*

At a Court of Sessions, begun to be holden in and for the District of Edgefield, in the State of South Carolina, at Edgefield Court House, in the District and State aforesaid, on the third Monday in October, in the year of our Lord one thousand eight hundred and forty-one, the jurors of and for the District of Edgefield aforesaid, in the State of South Carolina aforesaid, that is say:

Upon their oaths present, that Henry C. Turner, late of Edgefield District, in the said State, on the fourth day of September, in the year of our Lord one thousand eight hundred and forty-one, with force and arms, at Edgefield Court House, in the District of Edgefield aforesaid, did buy and purchase, of and from a certain slave, of the estate of Jonathan Wever, deceased, named Isom, who was then and there under the care and management of Oliver Hearn, two bushels of wheat of the value of two dollars, the said Isom then and there not having a permit so to sell, from or under the hand of the said Oliver Hearn, or from or under the hand of any person *not having* the care and management of said slave; against the form of the Act of the General Assembly of the said State, in such case made and provided, and against the peace and dignity of the same State aforesaid. And the jurors aforesaid, on their oaths aforesaid, do further present, that the said Henry C. Turner, on the fourth day of September, in the same year aforesaid, with force and arms, at Edgefield Court House, in the District and State aforesaid, did deal, trade and traffic, with a certain negro man slave Isom, of the proper goods and chattels of Jonathan Wever, in his lifetime, who was then deceased, and which said slave was then and there under the care and management of John R. Wever, by selling to the said slave Isom, *one half a pound of coffee and two pounds of brown sugar*, the said slave then and there not having a permit, so to deal, trade and traffic, from or under the hand of the said John R. Wever, or from or under the hand of any other person having the care or management of the said slave; against the form of the Act of the General Assembly of the said State, in such case made and provided, and against the peace and dignity of the same State aforesaid. And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said Henry C. Turner, on the fourth day of September, in the same year last aforesaid, with force and arms, at Edgefield Court House, in the District and State aforesaid, did deal, trade and traffic, with a negro man slave named Isom, who belonged to Jonathan Wever, in his lifetime, and was then deceased, and the said slave was then and there under the care and management of Oliver Hearn and John R. Wever, by purchasing and receiving of the said slave *two bushels of wheat of the value of two dollars*, and by selling and delivering to the said slave, one half pound of coffee and two pounds of brown sugar; the said slave then and there not having a permit so to deal, trade and traffic, from and under the hands of the said Oliver Hearn and John R. Wever, or either of them, or from and under the hand of any person having the care or management of the said slave; against the form of the Act of the General Assembly of the said State, in such case made and provided, and against the peace and dignity of the same State aforesaid.

CALDWELL, *Solicitor.*

slave did not have a permit to deal from any person having the care or management of him.

2. That the third count is void for multifariousness, in alleging two or more distinct acts of trading.

3. That none of the counts set forth an act of trading, as no price or consideration is alleged.

4. That none of the counts contain a sufficient description of the ownership or management of the slave.

Grounds for a new trial:

1. That there was not sufficient proof of trading.

2. That the presumptive proof, under the Act of 1834, was insufficient, as the defendant was not indicted as a shopkeeper.

3. That the description of the slave was falsified by the proof.

Wardlaw, for the motion.

Caldwell, Solicitor, contra.

Curia, per RICHARDSON, J. Both Hearn and Wever proved the trading of defendant with Isom, directly, by selling him the coffee and sugar, as alleged in the second count of the indictment. And that Isom was under their management. They also proved, circumstantially, that Turner received the wheat of Isom and paid him, in part, with *coffee and sugar; which verified the whole trading charged in the third count. The defendant was not indicted as a shopkeeper, although it appeared plainly that he kept a store. We cannot therefore, grant a new trial, upon the evidence, because it fully justified the verdict. [*402

Next, as to the motion in arrest of judgment. The first count may be admitted to be defective and bad, for the reason alleged in the first ground of the motion in arrest. The defendant had the benefit of that admission, by the charge of the Judge; and was, of course, convicted under the second or third count—or under both. If one of them be good it is enough. But both are good. The second alleges Isom to have been under the care and management of John R. Wever; and the alleged trading was, in selling Isom coffee and sugar, without a permit. The third count varies from the second, in this—that Isom was under the care and management of both Hearn and J. R. Wever; and that the defendant both sold Isom the coffee and sugar and purchased the wheat at the same time. These acts were not separate tradings, but separate parts of the same trading. This count embodied the whole evidence as given by Wever and Hearn, and cannot be defective, by stating the whole trading, as consisting in the purchase of one article, and the sale of another. This third count included the second count; and did more, by alleging that Isom was under the care of Hearn, as well as Wever; and that the defendant purchased the wheat as well as sold the coffee and *sugar, either of which was a sufficient act of trading. But the two do not lessen the trading. There is, then, no defect in either of these two counts; and I need scarcely observe, that wherever one of the counts is good, the Court awards judgment upon it, (1 Salk. 384; 1 Johns. 7, 322; 2 Burr. 985; Doug. 723;)(*a*) notwithstanding the other counts were bad. It was formerly otherwise, in civil [*403

(*a*) Sup. 122; 3 Strob. 341 *An.*

actions, in many cases, where the court could not tell but that the jury had awarded the damages upon the bad count. But never in criminal prosecutions, where the Court awards the punishment upon the good count alone.(*a*) This motion is, therefore, also dismissed.

O'NEALL, EVANS, EARLE and BUTLER, JJ., concurred.

J. M. FELDER *vs* THE LOUISVILLE, CINCINNATI AND CHARLESTON RAILROAD COMPANY.

Where the slave of the plaintiff, endowed with ordinary intelligence and acquainted with the nature and manner of using the railroad, voluntarily laid himself down on the road and went to sleep, amidst grass so high as to obstruct the view at some distance, (over twenty feet ahead,) and in this situation, without any fault of the engineer, the engine going at its ordinary speed, passed over the body and killed the slave: It was *held*, that the plaintiff could not recover against the company for the price of the slave killed, under the circumstances, and ordered a nonsuit.

Before O'NEALL, J., at Orangeburg, Spring Term, 1842.

This was an action on the case, for negligence in so keeping the railroad, that thereby the locomotive and its attendant train, belonging to the defendants, ran over and killed a negro boy belonging to the plaintiff. The following are the facts of the case, as detailed on the trial below, and the points ruled by the court.

*404] *It appeared in proof, that that portion of the railroad running through the plaintiff's plantation, (called the Coalter place,) was overgrown with rank and luxuriant grass, so that an object like the boy lying upon the railroad could not be seen at the distance of twenty feet, as some of the witnesses said; others, however, said, standing at the engineer's post on the engine, they could have seen such an object at the distance of two hundred feet; but within that distance the engine could not be stopped.

As the engine, on the 13th day of August, 1840, was ascending the road, at her usual time, and at her usual gait of twenty miles an hour, the engine ran over the boy belonging to the plaintiff, who was lying on the rail, crushing and nearly severing his body transversely, from underneath the right shoulder to the exterior point of the left. The body lay with the feet outside the track, the head and shoulders on the rail. The engineer did not see the boy, owing to the tall grass, until he was so near to him that he could not stop the engine

The proof on the part of the defendants, was mainly directed to show that the boy was dead before the engine passed over his body. The supposition on the part of the defendants was that he had been killed by the plaintiff's driver, and laid upon the road, so as to permit the engine to pass over his body. This point was fully explained, and carefully submitted, as a question of fact, to the jury. In finding for the plaintiff, they of course found that the boy was alive when the engine passed over his body; and as this part of the case is unquestioned by the appeal it is unnecessary to state the evidence.

(*a*) See 1 McM. 189; 7 Rich. 490; 1 Strob. 455; Cheves, 105; 3 Hill, 1. *An.*

The jury were instructed that the company was only liable, in this form of action, for the neglect of themselves or their agents. There was no blame to be imputed to the engineer. The only neglect on the part of the company which could make them liable was the suffering the road to be so overgrown with grass as to hide an object from the view of the engineer within such distance that he could not prevent the engine from passing over it.

They were told that negro slaves were moral agents, capable of placing themselves in, or extricating themselves from danger. If the boy (who was a plough-boy, and *therefore capable of understanding the danger,) voluntarily or rashly placed himself in the way of the [*405 engine, as she was approaching, then the plaintiff could not recover. But if the boy, without any knowledge of the approach of the engine, and in fact before she was in the neighborhood, lay down upon the railroad and was asleep, and therefore unconscious of the approach of the engine, and in that state she passed over his body, then the plaintiff might have a verdict.

The jury found for the plaintiff the value of the boy.

The defendants appeal on the annexed grounds:

1. Because his Honor charged that if the negro was asleep on the road, the company was liable.

2. Because the finding of the jury was contrary to law.

Glover, for the motion cited, on the first ground, 3 Starkie on Ev. 986; 11 E. 60; 2 Taunt. 314; 6 *Ib.* 29; 2 J. 283.

Bellenger, contra, cited Legis. Rep. of '37, p. 25, for the definition of negligence. 2 L. Ray. 1089; 2 Esp. Rep. 544. Use must be in a lawful and proper way.

Curia, per BUTLER, J. The only question involved in this case upon which it is the design of the court to deliver its judgment, should rest on a distinct statement of unquestioned facts, unconnected with irrelevant circumstances. The plaintiff's slave, endued with ordinary intelligence, and acquainted with the nature and manner of using the railroad, voluntarily laid himself down on it and went to sleep, amidst grass so high as to obstruct the view at some distance over twenty feet ahead. In this situation, without any fault of the engineer, the engine going at its ordinary speed, passed over and killed the slave. There are two causes which may have contributed to this result. The first is the grass being so high as in some measure to restrict the view of the engineer, and thereby preventing him from guarding against accidents as effectually as he otherwise might have done; and the second, that of the boy voluntarily and with reckless imprudence placing himself in danger, so as to bring upon himself the catastrophe. The one was a remote source of danger and could not be regarded as the proximate or necessary cause of the *accident, for the engine might have run over the boy not- [*406 withstanding the high grass, as from the situation of the body it might not have been seen by the engineer until it was too late to stop the engine in its rapid progress. The other cause was immediate and necessary; for unless the boy had lain down on the road he would not have been hurt. This proposition then presents itself—should the company be held liable for an injury to a slave or other rational person, when there is no fault imputable to the engineer having direction of the locomotive, and

when such person with voluntary imprudence places himself in a situation of danger? It seems to me that it would be a hard rule of law, repugnant to common notions of justice, that would require the Court to support the affirmative of this proposition. It would be to make the company not only liable for its own negligence, but for injuries arising from the fault and imprudence of others, and they strangers, too, in nowise connected with the employment of the company. If one were to put on the road a parcel of goods, and they were to be destroyed by the cars running over them without fault of the engineer, could such an one recover damages of the company? I think not. So far from it, the party would be liable to an indictment for obstructing the road. Suppose another case—that a white man should go to sleep with a leg on the road, and that his leg should be broke, under any imaginable circumstances preventing the engineer from seeing it at the time, could such white man take advantage of his own foolish imprudence to make the company liable for the injury he had sustained? If so, the next step would be to make the company liable for all injuries which persons may sustain arising from their own rashness and want of foresight. One might recover because his horse ran away and threw him in consequence of the animal becoming frightened at the cars. And in this way the company would be deprived of all benefit of their road, by being liable for damages to those who will not take care of themselves. It is supposed, however, that the owner may recover for an injury to a slave, when he could not recover for an injury to himself. I cannot well see the propriety or justice of this distinction. A slave is regarded as a chattel, but
*407] not such a chattel as brute animals, *that have not intelligence to enable them to understand and conform to human arrangements of the nature of railroads. These latter may go on the road without knowing their danger, and have nothing higher than instinct to direct them in attempting to escape from it. With good reason, therefore, should the company be held liable for injuries done to them. The defect of the brute must be regarded and supplied by the agents of the company—that is, where it goes into danger of its own accord; but when it is put in danger by the voluntary design of the owner, the owner ought not to be allowed to convert his own act into a cause of action. In this respect a slave is like his owner; he is a moral being of volition and intelligence, capable, by his foresight, of avoiding danger, or of extricating himself from it by consulting his reason. In regard to the liability of common carriers, the difference between slaves and other chattels has been fully recognized by our Courts. In the case of *McDonald* vs. *Clark*, 4 McC. 225, the distinction is taken. Slaves are there regarded as other passengers, who, amidst the dangers of a wreck, may consult their own reason to extricate themselves from it. Judge Johnson remarks—"There is then a radical difference between the liability of a carrier with respect to the transportation of a slave, and a bale of goods. The latter has neither the power of volition or motion, and is completely under his control. The former is operated on by moral causes; the latter only by physical." This remark suggests a distinction which may well obtain with regard to the liability of the railroad company to those whom they may have in charge as passengers or in their employment, and mere strangers. The former have a right to look to the company to take care of them by

the exercise of competent skill and reasonable prudence. Whilst the company would have a right to suppose that the latter would take care of themselves, or at least would not voluntarily put themselves in a dangerous situation. The duty of giving attention to one, does not extend to the others whose obtrusions would be calculated to lead to surprise and confusion. The law very wisely requires every one to rely on his own prudence; and he should consult that before he undertakes to take advantage of the faults of others. The *case of *Butterfield* vs. *Forrester*, 11 East, 60, is decided on this view of the subject. It [*408 appeared in that case that the defendant, for the purpose of making some repairs to his house, which was close to the roadside, had put up a pole across that part of the road, a passage being left by another passage, &c. The plaintiff left a public house not far from the place in question, at 8 o'clock in the evening, in August, when they were just beginning to light candles, but while there was light enough to discern the obstruction at one hundred yards distance, and which the plaintiff might have observed and avoided; the plaintiff, however, who was riding violently, did not observe it, but rode against it and fell with his horse, and was much hurt in consequence of the accident. Under these circumstances the jury found for the defendant, by the direction of the presiding Judge. On a motion for a new trial the verdict was confirmed. The judgment of Lord Ellenborough is full of good sense when he says, "A party is not to cast himself on an obstruction, which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. One person being in fault will not dispense with another using ordinary care for himself. Two things must concur to support this action—an obstruction in the road, by the fault of the defendant, and a want of ordinary care to avoid it on the part of the plaintiff." To the same purport is the case of *Flown* vs. *Adam*, 2 Taunt. 314. According to these views, the plaintiff had no right to avail himself of the omission of defendants to cut the grass down, when it appeared that his slave's own imprudence was the primary and proximate cause of his death. As the facts upon which the judgment of the Court is based, seem to be unquestioned, it would be useless to send the case back for a new trial. A nonsuit is therefore ordered.

RICHARDSON, EVANS and EARLE, JJ., concurred.

O'NEALL, J. I dissent, on the ground on which the case was decided below.

See *Richardson* vs. *W. & M. R. R.*, 8 Rich. 127; *Kelly* vs. *City Council*, 4 Rich. 426; *Zemp* vs. *W. & M. R. R.*, 9 Rich. 93; *McClenaghan* vs. *Brock*, 5 Rich. 71; *Liseman* vs. *S. C. R. R.*, 4 Rich. 414; 11 Rich. 291; 1 McM. 385, 409. *An.*

*409] *VARNUM, FULLER & Co. *vs.* THOMAS EVANS.

1. Where an attorney, acting under a power of attorney, from the attorney of the principals, recites in the deed of release, the power from the principals to the attorney, or person from whom he derives his powers, and in the body of the said release says, "by virtue of the authority vested in me as aforesaid, and in the name and in behalf of the said Varnum, Fuller & Co." (the principals), "and others, I accept the provisions in the said assignment, made in this behalf, and do further release and discharge, &c. Signed J. Winslow, [L. S.] Attorney for C. P. M., J. Winslow, [seal] Agent for V., F. & Co." It was *held*, that this execution was in compliance with the rule which requires a deed executed by an attorney to be sealed and delivered in the name of his principal.
2. An acceptance of a provision under a deed of assignment, and a release of the principal, with the assent of the security, is equivalent to a discharge by operation of law, and the rights of all concerned are the same under one as well as the other.

Before BUTLER, J., at Marion, Spring Term, 1841.

This was a special verdict, and from it the facts and matters in issue between the parties may be fully understood. The verdict is as follows:

We find that the defendant and R. B. Wiggins & Co., executed the following note:

"NEW YORK, 24th July, 1832.

$1477 11–100. Twelve months after date we jointly and severally promise to pay to the order of Varnum, Fuller & Co., at their counting room, No. 165 Pearl street, fourteen hundred and seventy-seven dollars 11–100, for value received.

R. B. WIGGINS & Co.,
THO'S EVANS."

That on the 14th of March, 1833, R. B. Wiggins made an assignment to Thomas Evans, the defendant, and Edward B. Wheeler, providing for the payment of the plaintiffs' debt, (among others,) in the first class of the debts enumerated—with a condition therein expressed, that all creditors who did not, within a specified time, execute a release to the said Wiggins, of all claims, except upon the property assigned, should be debarred from all benefit to be derived from such assignment.

On the 1st of April, 1833, the plaintiff, among others, executed a power of attorney to C. P. Mallett, empowering him, or such agent as he
*410] might think fit to appoint, to *act in their behalf, in making a settlement with the assignees of R. B. Wiggins & Co., and to execute such paper or papers as might be necessary to entitle them to the benefit of the assignment made by said Wiggins on the 14th of March, aforesaid.

On the 8th day of April, the said Mallett, executed a power of attorney to John Winslow, reciting the above and appointing said Winslow his attorney in the transacting of said business—ratifying and confirming all and several his acts in the premises, as fully and effectually as if done by himself in his own proper person. (Signed) C. P. Mallett. [Seal.]

On the 9th day of April, 1833, the said Winslow came to Marion Court House, and executed an instrument reciting the above-stated powers of attorney and assignment, and declaring that "I, the said Win-

slow, attorney and agent as aforesaid, in consideration of the provision made by said Wiggins, in his said deed of assignment, for the said Varnum, Fuller & Co., (and others,) and in consideration that they shall severally receive such amount of money from the above-named assignees, or either of them, in proportion to their respective interests in said assignment, as they shall be thereunto severally entitled in pursuance of the terms thereof, do hereby, by virtue of the authority vested in me, as aforesaid, in the name and in behalf of the said Varnum, Fuller & Co. (and others) accept the provisions in the said assignment, made in this behalf, and do further release and discharge the said Ricks R. Wiggins, and R. B. Wiggins & Co., from all further or other liability arising under and by reason of the following claims, being the amount respectively due the said parties, by the said R. B. Wiggins & Co., (then among others enumerating the note sued on, and an account due the plaintiffs for $504 89)

(Signed,) JOHN WINSLOW, [Seal.]
Attorney for C. P. Mallett.
JOHN WINSLOW, [Seal.]
Agent for Varnum, Fuller & Co.

We further find that Evans was not guilty of fraud in representing to Winslow, that the assigned effects were sufficient to pay the claim of the plaintiffs, but that Evans *assented to the release thus given, and that it was made at his instance and request, and for his benefit— [*411
Evans was the only assignee who acted—Wheeler refused to act.

If the Court should be of opinion, from the facts thus found, that the plaintiffs are entitled to recover, then we find for them, the sum of two thousand three hundred and seventy-five dollars, thirty-five cents—if not, we find for the defendant.

(Signed,) JAMES LANE,
Foreman."

Upon the facts found in the foregoing special verdict, his Honor, the presiding Judge, pronounced the following judgment, in favor of the plaintiffs, for the reasons annexed.

1. Because the release having been taken by the surety himself, it was for his benefit, and not in derogation of his right.

2. The release should have been executed by the agent, Winslow, in the name of his principals, to have made it effectual against them. The form in which the paper is executed, would subject Winslow to its obligations, while it imposes none on his principals. It purports to convey or release an interest, and as such, it should have been executed in the name of the plaintiffs *by their agent.* Let the postea be delivered to the plaintiff.

The defendant appealed for a new trial, on the following grounds:

1. The presiding judge erred in directing the postea to be delivered to the plaintiff, because, although the release may have been taken for the benefit of the defendant, there being no fraud, the effect was to discharge him from liability on the note, as an instrument.

2. Because the release was executed in legal form.

3. Because, if it was not valid as a formal release, it was still valid and effectual, as a discharge by an authorized agent, on a sufficient consideration.

Dargan, for the motion, on second ground, cited *Fash* vs. *Ross*, 2 Hill, 294;

Taylor vs. *McLean*, 1 McM.; *Welsh* vs. *Parish*, 1 Hill Rep. 161; *Combe's* case, 9 Coke; 1 Salk. *95; 5 Com. Law Rep. 223; *Burrell* vs. *Jones*, 5 M. & S. 3
*412] 45; *Ledbetter* vs. *Farrow*, 1 L. N. P. 356; 33 Com. L. 34; 10 Wend. 275; 6 Con. Rep. 464; 8 Pick. Rep.; *N. E. J. Co.* vs. *De Wolf*, 2 Pick. 222; 11 Mass. Rep. 26; 1 Camp. 184; 2 Wheat. Rep. 56; 4 McC. 323; 1 B. & Cress. 150; 2 B. & Ad. 328; 6 Ves. Jr. 305.

McIver, contra, contended that the execution by parol and by deed are different. This was an execution by deed. The instrument set up is void. Cited 1 Bail. 517; *Prior* vs. *Colter*, 2 Kent Com. 492–493. Cited also, *Fash* vs. *Ross*, 2 Hill; and *Taylor* vs. *McLean*, 1 McM.; *the State Bank* vs. *Kerr*, 1 McM. 141.

Curia, per O'NEALL, J. In this case I first propose to inquire whether the execution of the release was such as binds the plaintiffs.

The attorney recites the powers from the principals to Mallet and from Mallet to himself, and in the body of the release says, "by virtue of the authority vested in me as aforesaid, *in the name and in behalf of the said Varnum, Fuller & Co.*, (and others) I accept the provisions in the said assignment made in this behalf, and do *further release and discharge*, &c." The attorney executed this release as follows: John Winslow, [L. S.] attorney for C. P. Mallet. John Winslow, (seal) agent for Varnum, Fuller & Co. Was this execution a compliance with the rule which requires a deed executed by an attorney to be sealed and delivered in the name of his principal? I am satisfied it is. It purports to be by the authority, (the power recited,) and in the name and in the behalf of the principals. This is as ample an execution as if the deed had begun, "We, Varnum, Fuller & Co.," and had been executed "Varnum, Fuller & Co., by John Winslow, their attorney, [L. S.]" In thus stating an execution by Varnum, Fuller & Co., I am well aware that a firm cannot be bound by deed, unless each partner seal and deliver it, or assent to the execution by one for all. But as no such objection was urged against the execution, we take it for granted that the execution was, in this respect, binding, and the notice of it has been merely to prevent a misconstruction of our opinion. In *Pryor* vs. *Coalter*, 1 Bail.,
*413] 517, and *Welsh* vs. *Parish*, 1 Hill, 155, *there was nothing on the face of the deeds which showed that the act done was "in the name and in behalf" of the principal. Each purported to be the act of A. B. attorney of C. D.; and hence the deeds could not be the deeds of the principals. The difference between those cases and this mark a plain and obvious distinction. *This*, although signed and sealed by the attorney, is declared to be by the authority and in the name and in the behalf of the principals, which was the same as if the attorney had said, by the authority of the principals and in their names and stead, I sign, seal and deliver this deed. About the validity of such an execution, no one could doubt, and this being equivalent is equally good and binding. In *Welsh* vs. *Parish*, 1 Hill, 162, Judge Johnson recognizes *Wilkes* vs. *Bock*, 8 E. 142, as good law. For he says "*that case* turned altogether upon the manner of signing the bond, and it was certainly very immaterial whether the name of the agent or principal was placed first, *provided the undertaking or obligation was in the name of the principal.*" Referring to *Wilkes* vs. *Bock*, it fully sustains the position that the deed is the deed of the principal, if it purports to be in his name and behalf, no matter how it is signed by the attorney. In that case Wilkes and Brown

had been co-partners. Bock was indebted to them by account. Brown was absent, but Wilkes was his attorney; there was some dispute about the payment of the account, and it was agreed to submit it to arbitration, and the parties entered into bonds to abide by the award. Wilkes, for himself, and as attorney for Brown, executed their bond in this form, Matthias Wilkes, [L. S.] For James Browne; Matthias Wilkes, [L. S.] The question was, whether Brown was bound by the award made up according to the submission. It was held that he was, inasmuch as the execution, from the bond itself, appeared to be done for him, and in his name, and by his authority. That decision touches this case. For it is no more a strict execution than is the case before us. From the release in this case, as well as the bond in that, the execution appears to be done for the plaintiffs, and in their name and by their authority; and hence, on the authority of that case, is entitled to be supported. Nor is Combe's case, 9 Rep., 86, (which has given rise to all this *nicety about the execution of deeds by attorneys,) at all opposed to this conclusion. [*414 That was the case of a surrender of a copyhold by an entry on the rolls of the Court. It was made by attorneys, but not in the name of their principal; inasmuch, however, as in the entry the attorneys set out their power, and referring to it, declared the entry to be in pursuance of the authority thereby given to them, it was held to bind the principal. This, it will be noted, is a direct authority in support of the release in question. For it declares an act done in pursuance of a recited power made by the principal to be his act, and hence, as the same circumstance is found in this case, it supports the view that the release here is the deed of the plaintiffs. But I admit that the entry there was an act, without sealing or delivery, and that in that point of view, this case is distinguished from the point there decided. The Court, however, in enforcing the judgment, stated the principle which gave rise to the rule governing this case. It was there said, "if attorneys have power, by writing, to make leases by indenture, for years, &c., they cannot make indentures in their own names, *but in the name of him who gives them warrant.*" This is, I concede, the law governing all deeds made by attorneys, and to it their deeds must conform; but this is done whenever, as, in this case, the deed declares it to be made in pursuance of the authority and in the name and behalf of the principal. From this review and application of the law, I think the release is good; and this brings up the question whether it discharges the defendant. I do not think it does. In the first place, it does not seem to me that it is a discharge of Ricks B. Wiggins & Co. For it sets out that in consideration of the provision made by Ricks B. Wiggins, in his said deed of assignment, for the said Varnum, Fuller & Co., and others, and in consideration *that they shall severally receive such amount of money from the above named assignees, as they shall be thereunto severally entitled* in pursuance of the terms thereof, the provisions in the assignment are accepted; and Ricks B. Wiggins & Co., are released and discharged. The special verdict does not find that the plaintiffs ever received any thing under the assignment; and if they did not, I apprehend the release is without consideration, and is not binding *on the plaintiffs even, as against Wiggins. But be that as it may, it is clear, I think, in the second [*415 place, that Evans cannot pretend that he is discharged. The assignment

was to him, and to protect him in his securityship; to enable him to avail himself of the benefits of the assignment, the plaintiff's release was necessary to be executed. He procured it to be done, and the jury have found not only that he assented to it, but that it was for his benefit. Under such circumstances, it cannot be a release of him. For the release of one joint or joint and several debtor only operates as a release to the other, when made without his knowledge or assent, on the ground either that by the terms of the contract it cannot be enforced against one, but must be against both, or if by the terms of the contract it may be enforced against one, then that it deprives him of a remedy against his co-debtor. This case is under the last branch of the proposition stated; for the note of Wiggins & Co. and the defendant is joint and several. There is nothing therefore in the form of the contract to prevent a recovery against the defendant as a several promissor. The release deprived him of no remedy. For he himself was the assignee, and to make his remedy perfect, it was necessary to be executed. When therefore it was executed by his procurement, with his assent, and for his benefit, it cannot relieve him from the note to the plaintiffs. It is very analogous to a discharge, under the bankrupt or insolvent debtors' law; either would discharge the principal; but yet the security would be bound. An acceptance of a provision under a deed of assignment, and a release of the principal, with the assent of the security, must be equivalent to a discharge by operation of law, and the rights of all concerned would be the same, under one as well as the other.

The motion is dismissed.

RICHARDSON, EARLE and BUTLER, JJ., concurred.

See *Robertson* vs. *Pope*, in Errors, 4 Rich. 502. *An.*

NOTE.—The Reporter is not in possession of the different exhibits containing the evidence and all the facts that were before the Court; but he flatters himself that enough is furnished of the case to make it intelligible. He has given all that he received.

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*416] *JAMES H. COBB *vs.* GEO. W. PRESSLY, SHERIFF.

1. A sheriff cannot recover, (in an action of assumpsit,) from a purchaser at sheriff's sale, for property purchased, where the purchaser is the owner of the execution in his office entitled to a preference from the proceeds of sale, unless he can show that a part of the money arising from the sales was applicable to the payment of his costs, and then only the amount of his costs.
2. When one being the owner of an execution, under which the sheriff sells, purchases property at the sheriff's sales, upon an action of assumpsit against him by the sheriff for the amount of his bids, he cannot avail himself by way of discount of the amount of his execution in the sheriff's office, although his execution is entitled to the preference in the sales.

Before RICHARDSON, J., at Abbeville, Spring Term, 1842.

This was an action of assumpsit to recover $330 the price of a slave and cow bought by the defendant at the plaintiff's sale for cash, by

authority of executions against John Riley. It was admitted that the defendant was the assignee of a case in which William B. Hill was the plaintiff against Riley, and thus, although there were junior executions, the money when received should be applied to the defendant's execution. It was also admitted that no rule had been made against the sheriff, but the money was claimed by a junior execution creditor. The defendant filed a discount under which he claimed the proceeds of the sale, as applicable to the senior execution, and insisted that as the money would, if paid by him to the plaintiff, be applied to the execution of which he is assignee, the plaintiff should not be permitted to recover against him. The presiding Judge was of opinion, and so held, that the plaintiff was entitled to recover, and thus the matter of the discount could not avail the defendant. The court also held that as the sale was for cash, the plaintiff was entitled to recover interest on the price for which the property sold.

The defendant appeals, on the grounds annexed to this report.

1. Because his Honor the presiding Judge held that the defendant's discount is inadmissible, and thus the matters therein stated could not avail the defendant in the form of law.

*2. Because his Honor held that the plaintiff was entitled to recover interest from the time the property was sold to the defendant. [*417

Burt and *Thompson*, for the motion.

Perrin, contra.

Curia, per O'Neall, J. We all agree that the defence of the defendant *as a discount*, could not be received; for there was no demand on the part of the defendant against the plaintiff which could be the subject of a cross action. The defendant had the proceeds of the sale of Riley's goods in his own hands, and if he was entitled to retain he could have no claim against the sheriff. If he had not that right, still until he paid him the money he would have had no right of action on account of it; so that the discount is out of the question, and the whole case is resolved into the inquiry whether the sheriff could recover from the defendant *without showing that persons, other than the defendant, were entitled to receive the money from him* or that a part of it was applicable to the payment of his costs. It is generally true, that at common law, the sheriff is entitled to demand and receive the proceeds of a sale made by him, and to bring the money into court. But it is equally true, that when there is no reason for the enforcement of this rule, it ought not to prevail. Indeed one part of it is abrogated by statute. For *now* where there is no conflicting claim to money collected on an execution, the sheriff is bound to pay the same to the plaintiff in execution within ten days after he has received it, if demanded, under a penalty of 50 per cent. Act of 1796, 5 Stat. at Large, 284. *Thomas* vs. *Yates*, 1 McMull. 179. This abrogated the common law rule, that the sheriff was to bring the money into court in all cases. *That* is his duty now, *only* where there may be conflicting claims. Following up the reason on which the act is founded, that the plaintiff in execution is entitled to receive his money as soon as the sheriff may collect it; and considering its provision that when paid to him he is bound, at least within ten days afterwards, under a heavy penalty, to pay it to the plaintiff, the inquiry

is presented to the mind, why do so senseless and nugatory an act as to make the plaintiff in execution pay the amount of his bid by which he
*418] purchased the defendant's property, to the sheriff? I can give no satisfactory answer to that question; and recurring to the reasons on which the action of assumpsit proceeds, I think it is plain, that the defence ought to be sustained. In assumpsit we are fettered by no strict pleading. The plaintiff's demand, as in this case, that the defendant should pay him cash for property purchased and delivered to him at sheriff's sale, is fairly met by the answer, "I am entitled to receive the money from you, and my purchase, so far extinguishes my claim and is therefore paid in cash." If in point of fact the money when received by the sheriff is applicable to other debts then, of course, this showing at once destroys the defence. That the sheriff cannot be prejudiced by this view, is plain. For if the junior creditors sue him for the money, he has only to hold up this execution, under which the defendant claims, and say the money is applicable to it, and the defence is at once made out. If he has a claim for commissions or costs to be paid out of this property, then that may be recovered against the defendant under his purchase. For so far he is not entitled to retain. If the sheriff, when he sold, had refused to deliver the property, until the purchase money was paid, it may be, he might have done so, and it is possible, the defendant would have been without remedy. But after a delivery to the defendant, and consequently by that act the sheriff made himself liable to all the execution creditors for the proceeds, and by which, if it had been to another, the defendant might have demanded his money, and compelled him to pay it, under a penealty of 50 per cent., it would seem to be a self-evident proposition, that if the defendant was entitled to the money, he might legally refuse to pay it to the sheriff. The motion for a new trial is granted.

EARLE and BUTLER, JJ., concurred.

EVANS, and RICHARDSON, JJ. We dissent, because the sheriff has a right to demand the money of every purchaser.

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*419] *JONATHAN COOPER *vs.* WILLIAM HALBERT.

1. It is a well-settled rule that for all acts done under color of legal proceedings, where the court has no jurisdiction, or where the proceeding is irregular, *trespass and not case* is the proper form of action. See Harp. Rep. 486, *McCool* vs. *McCluney*.
2. In an action on the case, where the plaintiff's declaration complained that the defendant caused an execution to be issued and levied upon his land and goods, and the same to be sold by the sheriff, and the money arising from the sale of the same to be applied to the satisfaction of the said execution, and averred that afterwards the judgment upon which the execution issued "was set aside and rendered of no effect, &c., and afterwards a verdict was rendered in the same case for the defendant (now the plaintiff) whereby it was established that the said defendant (now plaintiff) was not in arrears, or in anywise indebted to the said defendant," by means whereof the said plaintiff was greatly injured, &c. It was *held*, that the declaration did not contain such a cause of

action as that the defect could be cured by the verdict of the jury, and a motion in arrest of judgment was sustained.

3. After verdict, the court will, by intendment, suppose every thing to have been proved which the allegations of the record require to be proved; but where every thing which constitutes the gist of the action on the case is omitted, the judgment will be arrested.

Before EARLE, J., at Laurens, Spring Term, 1842.

This was a special action on the case, for causing an execution to be issued against the plaintiff, and his land and goods to be sold by the sheriff, upon a judgment which was afterwards set aside for irregularity; the suit having been prosecuted by the defendant for a demand which was wholly unfounded.

The facts will fully appear by the report of the presiding Judge.

"The defendant was the administrator of an estate of which the plaintiff was one of the distributees. On making the plaintiff a payment, in 1831 or 1832, defendant took his receipt for the sum paid, with a stipulation annexed, that if, on final settlement, he should be found to have received more than his share, he would refund. In 1832, there was some settlement before the Ordinary, and the defendant alleged the plaintiff had received too much. At Fall Term, 1835, he brought his action on the accountable receipt; and at April Term, 1836, he obtained judgment, the plaintiff having entered no appearance, and made no defence. The case was ordered to be referred to the clerk, and on his assessment, judgment was signed and execution issued, under which, in January, 1837, the plaintiff's land, which he had previously sold for $400, *was sold [*420 by the sheriff for $97; a wagon, worth $60 was sold for $51; and a horse and saddle, worth $60 were sold for $45. The person who had purchased the plaintiff's land from him before, attended the sheriff's sale and became again the purchaser, at the sum above mentioned.

"At April Term, 1839, the judgment was set aside, and plaintiff obtained leave to appear and plead. Thereupon, issue was joined, and at November Term, 1839, there was a verdict for the defendant, now plaintiff. And at March Term, 1840, he brought this action.

"I overruled a motion for nonsuit, on the ground that the action should have been trespass, and not case, and sent the case to the jury, advising them to find for the plaintiff the actual damage, at least, with as much more as in their judgment the motives and conduct of the defendant warranted. They found for the plaintiff over $300, intended, I suppose, to cover the actual damage, with interest, cost, &c. There was no proof whether the purchaser of the land had or had not paid the amount of the purchase-money to the plaintiff. If he had not, he was liable for it, and entitled only to the abatement of the sum paid to the sheriff, which was the actual damage on that head. I instructed the jury, that the execution was a protection to the sheriff, in the sale of the plaintiff's property, without any opinion whether the sale was valid or not. Both parties appeal, on the grounds annexed."

The defendant appealed and moved in arrest of judgment, for a nonsuit and a new trial, on the following grounds, viz.:

In arrest of judgment:

1st. Because the declaration does not allege the *scienter* against the defendant.

2d. Because the declaration does not charge that the acts complained of against defendant were done wilfully, maliciously, and well knowing that the same were unlawful and void, which is necessary in this form of action.

For a nonsuit:

*421] *Because the action should have been trespass, and not *case, as the judgment under which the property was sold, was null and void, *ab initio.*

For a new trial:

1st. Because the Court charged the jury that the sale of the land and other property under execution of the defendant, against the plaintiff, referred to in the plaintiff's declaration, was legal, and vested a right in the purchaser.

2d. Because the defendant was not liable in this form of action, for the illegal acts of his counsel and other officers of Court, unless he acted with knowledge. The Court held, that he was liable for the acts of his counsel.

3d. Because the verdict is contrary to law and evidence.

Plaintiff's ground of appeal:

That his Honor the presiding Judge, erred in charging that the plaintiff had not sustained actual damages, on account of the land, above the sum for which it sold by the sheriff, when it was worth much more.

A. W. Thompson, for the motion, cited, on the grounds in arrest of judgment, 1 Chitty on Plead. 320, sec. 4. There must be a *scienter*. The declaration must contain an allegation that the act complained of was done maliciously. Referred here to 2 Wilson, 302, 307; 1 Chitty Plead. 133, letter U; Ib. 388, letter T. It must be alleged that the party knew the court had no jurisdiction. 2 Leigh N. Prius, 1402, 1404; 2 Chitty Plead. 242.

On the ground for nonsuit, cited 6 J. L. Dict. 363, letter D; 1 Brev. 120, sec. 22; 1 Cowan. 711. 734; 1 Chitty Plead. 132, letter S; 3 Starkie, titl. Trespass; 1 Bail. 441, *McHugh* vs. *Pundt;* Harp. L. Rep. 486, *McCool* vs. *McCluney; Rembert* vs. *Kelly*, Ib. 65.

Bobo, contra, relied on 7 Wend. 301; 1 N. & McC. 408; Ib. 224; 8 Johns. Rep. ——; Bacon Abr. ——; 5 B. & P. 446; Day's Ev. in note.

Curia, per EARLE, J. The plaintiff, in his declaration, complains that the defendant caused an execution to be issued and levied upon his land and goods, and the same to be sold by the sheriff, and the money

*422] arising from the *sale of the same to be applied to the satisfaction of the said execution; and avers that afterwards the judgment in favor of the defendant, upon which the said execution issued, "was set aside and rendered of no effect, &c., and afterwards a verdict was rendered in the same case for the defendant, whereby it was established that the said Jonathan was not in arrears or in any wise indebted to the said William," by means whereof the said Jonathan is greatly injured, &c.

Nothing is better established than the general rule, that for all acts done under color of legal proceedings, where the Court has no jurisdiction, or where the proceeding is irregular, trespass is the proper form of action. 1 Ch. Pl 184.(*a*) And where a judgment has been set aside for irregularity, that is the appropriate remedy for any act done under it. Ibid.; 1 Str. 509. This was expressly ruled here in *McCool* vs. *McLooney*, State Rep. 486, where it was held that case would not lie. And this is decisive of the present action, unless it can be supported on another ground, suggested on the circuit, and which induced me to overrule the motion for a nonsuit; it is that the proceeding was wholly unfounded as well as irregular, and was adopted by the defendant with an express

(*a*) See *Miller* vs. *Grice*, 1 Rich. 147; *Tripp* vs. *Martin*, 1 Sp. 238. *An.*

malicious intent. Such was the case in *Goslin* vs. *Wilcock*, 2 Wils. 302, for maliciously causing the plaintiff to be arrested, in an inferior court, which had no jurisdiction, without any probable cause, the defendant not having at the time of such arrest and imprisonment any just or probable cause of action against the plaintiff. In that case, no doubt, trespass would lie for the arrest in a court having no jurisdiction; and as the proceeding was adopted with an express malicious intent, in a court which the party knew had no jurisdiction, an action on the case would also lie, as the Court held; both malice and the want of probable cause being alleged and proved, as they were essential to the action. It is true that the allegation that the defendant knew the Court had no jurisdiction was not contained in the declaration; and the Court held it cured by the verdict and refused to arrest the judgment. In the case under consideration, the declaration was not referred to on the circuit, else I should have been constrained to nonsuit the plaintiff for the want of a *sufficient cause of action in the form adopted. It is alleged that the [*423 verdict for the defendant, now plaintiff, on the trial of the former issue after the judgment was set aside, established that he was "not in arrears, nor in any wise indebted" to the defendant; but there is no averment that the suit was brought, or that the execution was sued out, "with malice, and without probable cause;" both of which are essential to this form of action, and which must be alleged and proved, as the Court said in *Goslin* vs. *Wilcock*. But inasmuch as the plaintiff was not arrested and imprisoned, nor held to bail, no action lies against the defendant for a mere malicious suit, however groundless. Bul. N. P. 1 Salk. 14. No form of declaring, therefore, would have enabled the plaintiff to recover for having instituted and carried on a groundless action, although with malice. Could the defendant then have been made liable in an action on the case, for merely suing out an execution upon a judgment which had been rendered in his favor, and was still subsisting, although irregular? No doubt, if a plaintiff sues out an execution upon a judgment which he knows to have been fully paid off and satisfied, or a second execution upon a former under the same circumstances, he would be liable to an action, with the proper averments that it was done with malice and intent to harass, injure and oppress. But here there is no such case. The judgment, at the time of execution sued out and levied, was still of force; the defendant then, now plaintiff, had not appeared to defend, and there was an order for judgment by default, and the verdict which was finally rendered for him, after the judgment was set aside, is by no means conclusive that the defendant may not have had a probable cause of action, or may not have honestly believed that he had, both when he brought the action, and when he sued out the execution, which would have exempted him from liability in an action for a malicious arrest, if the plaintiff had been held to bail. *Gibson* vs. *Charters*, 2 B. & P. 129; 3 Esp. R. 34; 1 Camp. 295. If he was not liable for bringing the suit, however groundless, then he cannot be liable for suing out the execution, so long as the judgment was of force. Had it not been set aside, he could never have been made liable in any form, either in case, or trespass, or assumpsit, or recover* back the money. *Marryott* vs. *Hampton*, D. & E. As it [*424 was set aside for irregularity, it was the same as if it had never

had been rendered and he became a trespasser. To make him liable in case also, and thus accumulate the plaintiff's remedies, would seem to be unnecessary for the ends of justice. I will not say that it cannot be done with suitable averments and adequate proof. In such case, it would, at all events, be essential to aver and prove not only that the proceeding was malicious and without probable cause, but that the irregularity which avoided the judgment was in some way the act of the defendant or his attorney, and not the act of the Court, as it would seem to be, procured by falsehood or fraud with intent to injure the plaintiff. There is not in the declaration any such averment of malice or the want of probable cause, or any allegation that the defendant knew of the irregularity, nor any thing from which these facts can be fairly inferred. The simple averment is that the defendant caused an execution to be levied, and the judgment was afterwards set aside. This presents a case in which trespass alone would lie. After verdict the Court will, by intendment, suppose every thing to have been proved which the allegations of the record require to be proved; but nothing more. And where the declaration contains no cause of action, the defect is not aided by a verdict. Here every thing which constitues the gist of the action on the case is omitted, and the judgment must be arrested. The motion is granted.

RICHARDSON, O'NEALL, EVANS, and BUTLER, JJ., concurred.

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*425] *ROBERT DEVLIN *vs.* SIMPSON KILCREASE.

1. A party proving the declarations of another party concerning a trespass which had been committed, has the right to prove and give in evidence all the expressions that were used in the conversation relative to the trespass at the time, as well on account of their being a part of the same conversation as also to show to the jury the spirit and feelings with which they were spoken.
2. It is the right and also the duty of a judge to comment on all the evidence of a case to the jury, and in cases of complicated facts to give to the jury the aid of his experience, discrimination, and judgment upon the evidence, as well as the law, so that he finally leaves the ultimate decision of all the facts to their judgment. This is the practice of all Common Law Courts, and such is the well-settled practice in South Carolina.

Before RICHARDSON, J., at Abbeville, Spring Term, 1842.

This was an action of trespass for cutting the timber and poles of the plaintiff. The trees had been cut by defendant's negroes—and whether he ordered the trespass, was made a question by his counsel. This must appear from the evidence.

The evidence taken at the trial, and which has been reported by the presiding Judge, as his report of the case, is herewith subjoined, which with the grounds of appeal, will sufficiently explain the facts, and the questions made and decided by the Court.

"Mr. *A. Patton.* The defendant lived near to the plaintiff, on land of Henderson. Heard defendant say his boys had cut some rail-timber and some poles for chimneys. He had been to plaintiff to make up; but they would have to go to law. He had as much money as plaintiff to spend at law; and he could buy him

and all he had, if they were black; spring of 1841, before the suit. Said he had gone to plaintiff, and plaintiff to him first, and could not settle.

"*Cross-examined*—Conversation at McClinton's store—As to the first timber, he said plaintiff would be satisfied to cut as much of *his timber*. He did not say whether he had authorized it or not; but said his boys had cut it, &c. Witness did not attend to the whole conversation with McClinton. Said plaintiff was not willing to compromise the second trespass. Defendant attends closely to his negroes and business.

"Mr. *Samuel Leard*. Defendant said he had before cut *some two or three timber trees and some poles, and plaintiff would not settle, &c. He was contrary. [*426

"*Cross-examined*—Defendant said he offered to pay him, and he would not do it. Plaintiff was disposed to go to law; said his boys had cut the timber; did not say it had been done with his permission.

"*John McLaren*. Leased the land to defendant for Henderson, and offered to show defendant the lines; but defendant said he knew them from Mr. Dill. The fence runs on the line three-fourths of the way. Henderson's near timber land had been pretty much cut up.

"*Charles Sproull*. Knows plaintiff's land; not a large tract; timber scarce. Saw where the timber was cut; two rail trees; many poles; some fifty yards from the fence, or one hundred yards from Henderson's wood-land. Henderson's land had many stumps.

"*Bart. Jordan*. Examined the timber-land; appeared last February to have been cut recently; two pine trees of four cuts each, one hundred rails; a number of pole stumps, (twenty or twenty-five;) some good trees for rails on Henderson's land.

"The court charged the jury with all the facts, and especially to decide the question for themselves; but turned their attention to the use made of the poles, (for chimneys,) and to the expression of the defendant, as proved, and as indicating his concurrence in the trespass. If so, they were told that the plaintiff was entitled in law to recover at least the value of the trees taken, to which the jury might add reasonable damages for example's sake. The jury found for the plaintiff, $53."

From which verdict the defendant appealed, on the grounds following:

1. That the proof was, that the trespass was committed by the defendant's slaves, and no proof that the defendant ordered or directed it.

2. That his Honor charged the jury that the defendant's offering to pay the plaintiff for the trespass, was an acknowledgment that the trespass was done by his orders.

3. That his Honor charged the jury that he "believed that the defendant was guilty of the trespass;" whereas, it being a matter of fact for the jury, and doubtful from the *testimony, it should have been left to the jury, without any expression of opinion of his Honor, as to the guilt or innocence of the defendant. [*427

4. That his Honor admitted evidence that the defendant had said, (long after the trespass was committed,) "that if the plaintiff was black, he could buy him and all he had."

5. That the verdict is contrary to the law and the evidence.

Perrin, for the motion, on the first ground said, that it was necessary to prove that the defendant had committed the trespass. The declarations of defendant that his negroes had cut the trees, was no evidence that defendant had so ordered the cutting of the trees. The master is not liable in law for the trespass of his slaves, when not committed by his orders. The offer to pay by defendant is not sufficient evidence, for abstract justice would have prompted this offer; but no offer to pay was intended to charge himself as giving the order to commit the trespass.

On 3d ground, cited Graham on N. Trials.

4th ground. This is not such a declaration as would go to explain the character of the trespass. Cited Starkie Ev.; 2 Maul & Selwyn, 77; 2 Starkie Rep. 314.

The alia enormia only embraces such acts as are committed at the time of the commission of the trespass. Cited Treadway Rep.; also, Dudley.

Burt, contra, offered to argue, but was excused by the court.

Curia, per RICHARDSON, J. The fourth ground of the appeal, supposes that the expressions of the defendant to the witness, Patton, that "if Devlin was black, defendant could buy him and all he had," were incompetent. But these expressions were part of the conversation relating to the trespass, and his own offer to adjust the complaint. And the plaintiff had a right to adduce, before the jury, as well the spirit in which the defendant admitted the trespass done, as the facts. I do not perceive how else we could get fairly at what the defendant did acknowledge upon the subject, unless by hearing all he did say, leaving *it to the jury to apply the expressions for what they were worth, which was very little. The 2d and 3d grounds assume that the Judge ought not to indicate his own opinions upon the evidence, lest he should bias the jury. In this case such opinions were not more than indicated. But the frequency of such grounds of appeal leads me to remark, that according to the case of the *State* vs. *Bennett*, 2 Tr. Con. Rep, 692, it is the right of the Judge to comment upon the whole evidence to the jury. And in the case of the *State* vs. *Cassadoes*, 1 N. & McC. 91, it is decided to be not only the right, but also the duty of the Judge, in cases of complicated facts, to give to the jury the aid of his experience, discrimination and judgment upon the evidence as well as the law, so as he finally leaves the ultimate decision of all facts to their judgment. And such, I presume, is the practice of all common law courts. Of this, and from high authority, I will give one illustration. Lord Brougham, commending the judicial character and conduct of Lord Ellenborough, says: "Lord Ellenborough was not one of those Judges who, in directing the jury, merely read over their notes, and let them guess at the opinions they have formed, leaving them without any help or recommendation in forming own judgments. Upon each case that came before him he had an opinion; and while he left the decision to the jury, he intimated how he thought himself. This manner," he continues, "of performing the office of Judge, is now generally followed, and most commonly approved." (See 2d Brougham's Miscellanies, Public Characters, p. 39.) See the cases collected on this head, in Graham on New Trials; and I may add, such is the well-settled practice in South Carolina.

*428]

The motion is therefore dismissed.

O'NEALL, EVANS, EARLE and BUTLER, JJ., concurred.

See 8 Rich. 140; 7 Rich. 478; 1 Hill, 227. *An.*

*CHRISTIANA HATCHER *vs.* LUCINDA HATCHER. [*429

1. Where the plaintiff, being tenant for life, and the remainderman, during his lifetime, entered into the following written agreement, "That the said C. H. do agree to let E. H. build on the land willed to him by his father, at the death of the said C. H.; the said C. H. do also agree that E. H. may open and make all the improvements on said land that he thinks proper. The said E. H. do agree not to interrupt any thing that belongs to the said C. H. in person or property. If the said E. H. should interrupt or suffer any of his family to interrupt any thing belonging to the said C. H., the said E. H. do agree to pay the full value in cash or forfeit all the improvements on said land." It was *Held*, that the plaintiff had not, by this agreement, surrendered to the remainderman her freehold for life. That this paper conveyed nothing more than a tenancy at will, or a lease to terminate upon reasonable notice, or a privilege during his life and peaceable behaviour.
2. The Court say, "that in such anomalous agreements, we must look to the instrument itself for its own construction, as identical papers cannot be found already adjudged."

Before O'NEALL, J., at Edgefield, January, 1842.

This was an action of trespass to try titles. The plaintiff was the widow of John Hatcher, and the defendant was the widow of Edward Hatcher, a son of said John Hatcher. The said John Hatcher devised the land in dispute to the plaintiff for life, and after her death to said Edward Hatcher in fee. The plaintiff and Edward Hatcher entered into the following agreement.

Memorandum of an agreement made and entered into this the twenty-seventh day of August, in the year one thousand eight hundred and thirty-three, between Christiana Hatcher, of the one part, and Edward Hatcher, of the other part, showeth:

That the said Christiana Hatcher do agree to let Edward Hatcher build on the land willed to him by his father, at the death of the said Christiana Hatcher; the said C. Hatcher do also agree that E. Hatcher may open and make all the improvements on said land that he thinks proper.

The said Edward Hatcher do agree not to interrupt any thing that belongs to the said C. Hatcher, in person or property; if the said E. Hatcher should interrupt or suffer any of his family to interrupt any thing belonging to the said C. Hatcher, the said E. Hatcher do agree to pay the full value in cash, or forfeit all the improvements on said land.

In witness whereof, we have hereunto set our signatures *and affixed our seals, this the twenty-seventh day of August, in the year one thousand [*430 eight hundred and thirty-three.

C. HATCHER, [L. S.]
EDWARD HATCHER, [L. S.]

Witnesses—ALFRED HATCHER,
WILLIAM J. TURNER.

The plaintiff proved (in addition to the trespass, location of the land, notice to quit, &c.,) that Edward Hatcher in his lifetime, had greatly annoyed the plaintiff, by trespasses upon her negroes, horses, and other property; but she failed to prove any demand of satisfaction in money for these trespasses. His Honor charged the jury, that the said agreement amounted to a release by the plaintiff to Edward Hatcher, of her life estate, and that Edward Hatcher had not forfeited his interest under said agreement, without proof of his refusal to pay in cash for his trespass on plaintiff's property. The jury, in pursuance of the charge, found a verdict for defendant.

The plaintiff appeals for a new trial, on account of error in the presiding Judge, on the grounds:

1. That, according to the just construction of said agreement a tenancy at the will of plaintiff, was the only interest given to the said Edward Hatcher, which was terminated, as well by the acts of said Edward, as the notice given by plaintiff.

2. That all interest of Edward Hatcher, in the premises, was a personal privilege, which died with his person.

3. That said Edward Hatcher forfeited all interest under said agreement, by interrupting the plaintiff in the enjoyment of her property.

Wardlaw, for the motion.

Griffin, contra.

Curia, per RICHARDSON, J. The only question is, upon the proper construction of the agreement between Christiana and Edward Hatcher. Did she intend to surrender or release to him her estate for life, so as to make the remainderman, thereafter, the exclusive owner? That she intended by the agreement to give some estate, or privilege, *to
*431] Edward, is evident. But Mrs. Hatcher, being a freeholder during her own life, could, of course, make any lease, or give any less estate, tenancy, or privilege, without surrendering her freehold. In the contest for the one or the other of such estates, the court is to decide. And we are to bear in mind, that a freeholder for life, and one in fee simple, belong to the same class of estates. It is difficult to perceive in the agreement, that without any valuable consideration, or any reciprocal benefit, she intended to surrender her entire freehold, when so many less estates might have answered the purpose of her evident gratuity, and object of peace. If Edward had been any other than the remainderman, or a stranger, or Christiana the owner in fee simple, could we conclude that she had released her whole estate? If the freehold be given, why give him the expressed privilege to build and clear the lands? If so given, why make him, in a certain event, forfeit his improvements" only, which would be useless to her, if he kept the land, and inconsistent with the charaeter of a freehold estate in him? Such a forfeiture would have been idle in that case; and therefore it presupposes the land still in her. In such anomalous agreements, we must look to the instrument for its own construction, as identical papers cannot be found already adjudged. In the instance before us, it may have been more than a tenancy at will; but assuredly, not more than a lease to terminate upon reasonable notice, or a privilege during his life and peaceable behaviour, Mrs. Hatcher reserving still her freehold.

A mere gratuity should be plain, and ought not to be extended to its utmost latitude and by mere construction against the giver, when a less estate, and a very common one, may have been intended for the gift. Some mere lease or privilege must therefore have been the object of the agreement, and when Edward died, it passed away, and her life estate stood unimpaired by the agreement. The motion for a new trial is, therefore, granted.

EVANS and EARLE, JJ., concurred.

O'NEALL, J. I regret that I cannot take the view in this case which

has taken by a majority of *my brethren. But were it not for the fact, that the report was prepared by counsel, and does not set out the reasons of my judgment, I should not care to state *now* the reasons of my dissent. As it is, I think it right and proper, that I should state the grounds why I did not concur in the judgment just read. [*432

An instrument like the one in this case, is to be fairly construed by reading all its parts together, as applied to the subject matter of which it treats. If there be any doubt, it is to be resolved against the grantor. Taking these rules as our guide, I think there can be little doubt that the grantor, Mrs. Hatcher, intended to surrender to the remainderman so much of her life estate in the land, as he might enter upon and improve, under the condition that the estate thus surrendered might be resumed, if he (the remainderman) should interrupt or suffer any of his family to interrupt any thing belonging to the said C. Hatcher, and should fail to pay the cash value of said interruption. If this be not the true interpretation, I would ask, why it was that the condition of forfeiture of the "improvements" to be made by the said remainderman was inserted in the agreement? For, if it was only a tenancy at will, the grantor could enter, at any time after a notice of six months to quit at the end of the year. The condition of forfeiture shows that the tenant for life could not enter, until the forfeiture was incurred, and hence the notion of a tenancy at will is at an end. It cannot be, that it conveys only an estate for the life of the remainderman, for his covenants are not only for himself, but for his family, and the forfeiture is of the only roofs which he had provided to cover his wife and children, after his own head had been covered by the clods of the valley. The general grant of the tenant for life is to the remainderman to enter at once upon the land, build and make any "improvements that he thinks proper." This was to all intents and purposes a surrender of her life estate in so much of the land as he might build upon and improve. To say that his estate was defeated by his death is to visit loss upon a man by the act of God, and which had not been prescribed as a condition of forfeiture or termination by the parties. Such a thing was never before heard of.

*The only doubt which I ever entertained, was whether the agreement could operate, from its form, as a surrender. That, however, has been removed by *Smith* vs. *Mapleback*, 1 T. R. 441. In that case Smith was the proprietor of the "*Three Jolly Sailors at Rotherhite*," for a long term of years. He demised the premises to Swin, and Swin to Sellon. Smith afterwards applied to take the premises, and the following agreement, between Sellon and Anne Smith as the agent of her husband, was entered into, viz.: "Agreement between Mr. Smith and Mr. Sellon for the *Three Jolly Sailors at Rotherhite*: Mr. Smith to have the house on the terms mentioned in the lease, and to pay £8 10s. over and above the rent annually, towards the good-will already paid by Mr. Sellon." It was adjudged, that this was a surrender, and that the plaintiff was in under his original term, and that it was not a lease from year to year. If that agreement was properly construed to imply a surrender, much more, it appears to me, ought *this* to be so construed. [*433

Butler, J., signed neither opinion.

*434] *JOHN CLARKE *vs.* M. H. POOZER.
THE SAME *vs.* D. H. BAXTER.

1. The general rule unquestionably is, that if the owner of a chattel hire it to another, he cannot maintain either trespass or trover against a third person, in respect to any injury to, or conversion of it, during the time it is so hired. But to this general rule there is one exception, which is, if the bailee do an act inconsistent with the bailment, and calculated to defeat the rights of property of the owner, he may treat the bailment as ended, and maintain trover.
2. Where a married woman, previous to her marriage, executed to the plaintiff a deed of trust, for certain lands and slaves therein named, by which it was the duty of the trustee to permit the *cestui que trust*, during the term of her natural life, to use, possess and enjoy the rents, profits, issues, interests and emoluments, of the said lands therein mentioned, together with the profits, hire, labor and services of the slaves aforesaid; and the use, profits and increase of the stock and furniture aforesaid, without any limitation whatever; provided always the same shall in no wise be subject to the control, debts, contracts, or intermedling of any future husband, or other person whatsoever; and provided the said personal property in said deed shall not be removed out of the district of Charleston, without the consent of the trustee (the plaintiff) first obtained in writing. The plaintiff hired the slaves to Baxter, with whom the *cestui que trust* had intermarried, and they were in his possession in Orangeburg district at the time they were taken by execution against said Baxter, and sold. *Held*, that the plaintiff could maintain trover for the conversion of slaves sold, against the purchaser at sheriff's sale, it being in direct violation of the terms of the trust.

Before O'NEALL, J., at Orangeburg, Spring Term, 1842.

These were actions of trover brought by the plaintiff as trustee of a married woman, under a deed of trust executed by her before her marriage, by which he was directed to hold the property, slaves, to her separate use, and to permit her to have the services of the slaves. The slaves for which these actions were brought, were in possession of the *cestui que trust* and her husband. They were seized by the sheriff under execution against the husband, and sold, one to Poozer, for $7, and the other to Baxter for $50. A conversation by them was shown. They proved that Clarke, the trustee, said that he had hired, for the year 1841, the slaves to the husband of the *cestui que trust*. They were seized in January, and sold in February, 1841. The defendants contended that they were entitled to the possession for that time, and that plaintiff, who had brought his action before the end of the year, could not recover. The presiding Judge thought differently, and ruled "that the *cestui que trust* *435] was, under the deed, entitled to the *actual services and possession of the slaves; and the trustee had no right to hire them to the husband. If he did so hire, still he was entitled to recover them for the fulfilment of his trust." The jury found for the plaintiff.

The defendants appealed, on the annexed ground:

Because the interest of Daniel H. Baxter in the negro slaves was the subject of levy and sale, and till the year expired, the plaintiff had no cause of action.

Glover, for the motion, cited, in support of the appeal, Dudley Rep. 38, *Bell* vs. *Monahan et al.*; Riley Law cases, 24, *Forgartie* vs. *Hubbell*; 4 Dever. N. C. Rep. 70.

Whitmore, contra, said that from the terms of the deed, the hiring by the trustee was illegal, as the *cestui que trust* was entitled to the possession of the property.

Curia, per O'NEALL, J. The general rule unquestionably is, *if the owner of a chattel hire it to another, he cannot, during the time it is so hired, maintain either trespass or trover against a third person, in respect to any injury to or conversion of it.* The case of *Gordon* vs. *Harper*, 7 T. R. 9, is an illustration of it. There, furniture leased with a house was wrongfully taken in execution, by the sheriff; it was held that pending the lease, the landlord could not maintain trover against the sheriff. Because to maintain such an action, there must be in the plaintiff a right of present possession, as well as of property.(*a*) So in *Paine & Whitaker* vs. *The Sheriff of Middlesex*, 21 Eng. Crown, L. R., 390, goods on hire were wrongfully taken in execution, it was held that the owner could not maintain trover. This ruling, it must be borne in mind, was by Mr. Justice Abbott. For it will hereafter appear, that he had previously carved out an exception to the general rule. In *Bell* vs. *Monahan & Love*,(*b*) December, '38, this Court conformed very properly to the general rule, which I have stated. There, it was held, that the owner of a horse, who had hired him, could not maintain trespass against a constable who seized him in the possession of the bailee, and sold him. But to this general rule, there is, as I conceive, one exception, which is, if the bailee do an act inconsistent with the bailment, and *calculated to defeat the right of property of the owner, he may treat [*436 the bailment as ended, and maintain trover. In *Loeschman* vs. *Machlin*, 3d Eng. C. L. Rep., 359, it was ruled by Abbott, J., that the hirer of a piano, who sends it to an auctioneer to be sold, is guilty of a conversion, and so is the auctioneer, who refuses to deliver it, unless the expense incurred be paid. That decision, regarded as an exception to the general rule, upon the principle which I have pointed out, makes the two decisions of that great Judge, Abbott, in the case of *Paine & Whitaker* vs. *The Sheriff of Middlesex*, and *Loeschman* vs. *Machlin*, perfectly reconcilable; otherwise the conflict would be apparent and indefensible.

In North Carolina, *Andrews* vs. *Shaw*, 4 Dev., 70, the following case is stated. William Butler conveyed a slave to the plaintiff, in trust for his (Butler's) family. The trustee hired the slave for a year to Butler, who removed to a distant part of the State, and sold him to the defendant. The Court held that during the year of hiring, trover would not lie. This point, it will be seen, is in conflict with Abbott's decision in *Loeschman* vs. *Machlin*, and if it was necessary for the purpose of this case, I should be inclined to overrule it, and follow the English decision. But it is not; for I rest my judgment upon a ground perfectly consistent with it. In it, the trust seems to have been a general one, and that there was no right of actual possession, in the *cestui que trusts*, or that Butler's possession was their possession. This hiring was not, therefore, inconsistent with the trust. It might have been necessary to give it effect. But in the case before us, the deed of trust declares the duty of the trustee, (the plaintiff) to be "to permit the said Jane Rebecca Brown, during the term of her life, the rents, profits, issues, interests and emoluments of the said tract of hand, heretofore mentioned, together with the

(*a*) See *Spriggs* vs. *Camp*, 2 Sp. 181. *Bellum* vs. *Wallace*, 2 Rich. 80; Supra, 299. *An.*

(*b*) 3 Hill, 30. *Ar.*

profits, hire, *labor and services* of the slaves aforesaid, and the use, profit and increase of the stock and furniture aforesaid, to *have, use, possess and enjoy*, without any limitation or condition whatever. Provided always, the same shall in no wise be subject to the *control, debts, contracts, or intermeddling of any future husband, or other person whatsoever;* and provided the said personal property *above mentioned shall not be removed out of the district of Charleston without the consent and approbation, expressed in writing, of the said John Clarke." The *cestui que trust*, Jane Rebecca, after the execution of this deed, intermarried with Baxter, to whom the plaintiff hired the negroes, first in 1838, as evidenced by his note of hand, and they were in the possession of the *cestui que trust*, and her husband, in Orangeburg district, when seized in execution in January, 1841. The plaintiff, it was proved, said that he had hired them, *that year*, to the husband. If this be true, it was in direct violation of the trust, which was to permit Mrs. Baxter to have the services of the slaves, and that they should, in no way, be subject to the *control, debts*, or *contracts* of her husband. The contract of hiring, as between the husband and trustee, is void. For the trustee is to represent and to protect the wife's interest. He is to sue for her, so that she may be enabled to enjoy the property, according to the trust. If the hiring is good, and the sale by the sheriff good for the year, then the property is, in direct contradiction to the deed, made liable to the control, debts, and contracts of the husband. This cannot be allowed; and the contract of hiring between the husband and trustee must be treated as in violation of the rights of the *cestui que trust*, and void. The motions are dismissed.

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RICHARDSON, EVANS and EARLE, JJ., concurred.

See *Rice* ads. *Burnett*, Sp. Eq. 589. *An.*

CASES AT LAW

ARGUED AND DETERMINED IN THE

COURT OF ERRORS OF SOUTH CAROLINA.

Charleston February, 1842.

The State *vs.* The Bank of Charleston.(*a*)

After a bank has suspended specie payments, its charter (in contemplation of law) is forfeited; but where, after its charter was thus forfeited, it continued to exist *de facto*, and exercised all the privileges and immunities previously granted by the Legislature, and the Legislature afterwards, by subsequent legislation, declared that the corporation shall exist—it was held to be a waiver by the State of previous forfeiture.

Before Butler, J., at Charleston, May Term, 1841.

This was a *scire facias* to vacate the charter of a bank, for having suspended specie payments; and came upon a demurrer to the defendant's plea. The pleadings are as follows:

DECLARATION.

State of South Carolina, } *To wit.*
Charleston District. }

The State of South Carolina sent to the sheriff of Charleston district aforesaid, its writ in these words, that is to say: The State of South Carolina, to all and singular the sheriffs of the said State, *greeting:* Whereas, in and by a certain Act of the General Assembly of the said State, duly made and ratified on the seventeenth day of December, in the year of our Lord one thousand eight hundred and thirty-four, entitled "An Act to establish and incorporate another bank in the city of Charleston," after reciting that it was beneficial to the citizens of the said State, that another bank should be established in the city of Charleston,* [*440
in the district of Charleston and State aforesaid, it was provided and enacted, that subscriptions should be received for the purpose of raising the sum of two millions of dollars, to constitute the capital stock of the said bank, by certain persons, at certain places and on certain days, in the said Act mentioned and specified; and that all subscribers to the said capital stock, paying their subscription moneys respectively, and all persons who might afterwards become stockholders in the said company, upon complying with certain terms and conditions precedent, in the said Act mentioned, should be, and were thereby, incorporated, and made a corporation and body politic, by the name and style of "The Bank of Charleston, South Carolina," and should so continue until the first day of June, in the year

Note. The pleadings are given entire in this case, believing that they will be acceptable to the profession, as valuable precedents for future reference.—Rep.

(*a*) See *The State* vs. *Bank of South Carolina*, 1 Sp. 433, 537. *An.*

of our Lord one thousand eight hundred and fifty-six; with power at any time, before the expiration of the charter of the said Bank of Charleston, South Carolina, to extend the amount of the capital stock subscribed to a further sum of two millions of dollars. And in and by the said Act of the General Assembly aforesaid, the said State did, amongst other things, give and grant unto the said Bank of Charleston, South Carolina, the liberties, privileges and franchises following, that is to say: to be a corporation and body politic, and by the name and style aforesaid to be capable in law to have, purchase, receive, possess, enjoy and retain, to it and its successors, lands, rents, tenements, hereditaments, goods, chattels, promissory notes, bills of exchange, and all other choses in action, moneys and effects, of what kind, nature or quality soever, to an amount not exceeding, in the whole, three times the amount of the capital stock of the said corporation, and the same to sell, alien or dispose of; and also to sue and be sued, implead and be impleaded, defend and be defended, in Courts of record, or any other place whatsoever; and also, to make, have and use, a common seal, and the same to break, alter and renew, at pleasure; and to discount promissory notes, at a rate of interest not exceeding one per cent. for every sixty days, and to deal and trade in bills of exchange; and also to ordain, establish and put in execution, such by-laws, ordinances and regulations as shall seem necessary and convenient,

*441] *for the government of the said corporation, not being contrary to the laws of this State or of the United States; and generally to do and execute, all and singular, such acts, matters and things, which may be deemed necessary and proper for the good government and management of the said corporation; subject nevertheless to such regulations, restrictions, limitations and provisoes, as shall hereafter be prescribed and declared. And in and by the provisions of the said Act of the General Assembly aforesaid, the said State did further give and grant unto the said Bank of Charleston, South Carolina, the liberty, privilege and franchise of receiving and holding moneys on deposit; and also the liberty, privilege and franchise of issuing promissory notes and bills of credit, in the nature of a circulating medium, payable on demand when due, in gold and silver current coin of the said State; provided, that no bill or promissory note, for the payment of money, should be issued by the said Bank of Charleston, South Carolina, of a less denomination or of a less amount than the sum of five dollars. And in and by the said Act of the General Assembly aforesaid, it was also provided and enacted, that thirteen directors should be annually elected by the stockholders of the said Bank of Charleston, South Carolina, and that the said directors should choose one of their own number as president; and that the said president and directors should exercise such powers and authorities for the well government and ordering of the officers of the said corporation, as should be prescribed, fixed and determined by the laws and regulations thereof. All which, in and by the said Act of the General Assembly aforesaid, reference being thereunto had, will, amongst other things, more fully and at large appear. And whereas, after the making and ratification of the said Act of the General Assembly aforesaid, the subscribers to the capital stock aforesaid, and other persons, being stockholders in the said Company, having complied with and fulfilled the conditions precedent aforesaid, in the said Act prescribed, commenced business as an incorporated bank in the city of Charleston aforesaid, in the district and State aforesaid; and from thence hitherto, to wit, for the space of five years last past and upwards,

*442] at the city of Charleston aforesaid, in the *district and State aforesaid, the said Bank of Charleston, South Carolina, by virtue of the said Act of the General Assembly aforesaid, did use, and still doth use, the liberties, privileges and franchises following, that is to say: of being a corporation and body politic, in law and in fact, by the name and style aforesaid; and, as such corporation and body politic, of issuing promissory notes and bills of credit, in the nature of a circulating medium; of receiving and holding moneys on deposits; of discounting promissory notes; of dealing and trading in bills of exchange; and of carrying on and transacting such other moneyed operations and banking business, as are usually carried on, transacted and performed by incorporated banks. And whereas, we are given to understand, that after the said Bank of Charleston, South Carolina, had commenced business as an incorporated bank, as aforesaid, to wit, on the eighteenth day of May, in the year of our Lord one thousand eight

hundred and thirty-seven, at the city of Charleston aforesaid, in the district and State aforesaid, the said Bank of Charleston, South Carolina, having, before that time, put forth and issued, and having then and there outstanding and in circulation, as part of the actual currency of the said State, the promissory notes and bills of credit, in the nature of a circulating medium, of the said Bank of Charleston, South Carolina, so put forth and issued as aforesaid, to a large amount, to wit: to the amount of one million of dollars and more, and having also, before that time, received, and then and there having and holding, on deposit, divers other large sums of money, amounting in the whole, to the sum of eight hundred thousand dollars and more, for and on account of divers citizens of the said State and others; the president and directors of the said Bank of Charleston, South Carolina, resolved to suspend the payment in gold and silver, legal current coin of the said State, as well of all promissory notes and bills of credit, in the nature of a circulating medium, put forth and issued by the said Bank of Charleston, South Carolina, and of all moneys received and held by the Bank of Charleston, South Carolina, on deposit, as of all other debts, dues, obligations and liabilities, whatsoever, of the said Bank of Charleston, South Carolina; and then and there declared the determination *of the said Bank [*443
of Charleston, South Carolina, to suspend and refuse the payment in gold and silver, legal current coin of the said State, of the promissory notes and bills of credit, in the nature of a circulating medium, of the said Bank of Charleston, South Carolina, and of all moneys received and held by the said Bank of Charleston, South Carolina, on deposit; and that the said Bank of Charleston, South Carolina, from the said eighteenth day of May, in the year of our Lord one thousand eight hundred and thirty-seven, until the first day of September, in the year of our Lord one thousand eight hundred and thirty-eight, at the city of Charleston aforesaid, in the district and State aforesaid, continually did refuse, on demand made at the banking house of the said Bank of Charleston, South Carolina, during the regular hours of doing business, to redeem or pay in gold or silver, legal current coin of the said State, the promissory notes and bills of credit, in the nature of a circulating medium, of the said Bank of Charleston, South Carolina, which had been put forth and issued by the said Bank of Charleston, South Carolina, and did also then and there refuse to pay in the said coin the moneys received and held by the said Bank of Charleston, South Carolina, on deposit; and during all the time last aforesaid, the said Bank of Charleston, South Carolina, at the city of Charleston, aforesaid, in the district and State aforesaid, continued, nevertheless, to put forth and issue the promissory notes and bills of credit of the said Bank of Charleston, South Carolina, in the nature of a circulating medium, to receive moneys on deposit, to discount promissory notes, to deal and trade in bills of exchange, and to carry on and transact such other moneyed operations and banking business as are usually carried on and transacted by incorporated banks, and then and there, during all the said time last mentioned, paid out, as money, upon such deposits, discounts and other banking operations and transactions, the promissory notes and bills of credit of the said Bank of Charleston, South Carolina, and of other incorporated banks which had also then suspended payments in legal current coin. To the great damage of all the good citizens of the said State; in violation of the trusts and conditions of the charter of incorporation granted to the said Bank of *Charleston, South Carolina, by the [*444
said Act of the General Assembly aforesaid, and to the utter perversion of the ends, objects and purposes for which the powers, authorities, liberties, privileges and franchises aforesaid, were given and granted to the said Bank of Charleston, South Carolina, as aforesaid.

And whereas, also, in and by another Act of the General Assembly of the said State, duly made and ratified on the eighteenth day of December, in the year of our Lord, one thousand eight hundred and forty, entitled "An Act to provide against the suspension of specie payments by the banks of this State," it was, amongst other things, provided and enacted, that the provisions of the said last mentioned Act should be and become a part of the charter of every bank already incorporated within the said State, which should accept the same; and that every bank in the said State which had heretofore suspended the payment of its notes in legal coin, or which had declared its determination to refuse or suspend such

payment, should, on or before the first day of March next after the ratification of the said last mentioned Act, notify the Governor of the said State of its acceptance of the provisions of the said last mentioned Act; and that in case any such bank should neglect to give such notice, the said Governor should forthwith cause legal proceedings to be instituted against such bank, for the purpose of vacating and declaring void its charter. And whereas, we are further given to understand, that although the said first day of March next after the ratification of the said last mentioned Act hath elapsed, the said Bank of Charleston, South Carolina, not only hath not as yet notified the Governor of the said State of its acceptance of the provisions of the said last mentioned Act, but, on the contrary thereof, at a general meeting of the stockholders of the said Bank of Charleston, South Carolina, duly called, according to the provisions of the charter aforesaid of the said Bank of Charleston, South Carolina, and held in the city of Charleston aforesaid, in the district and State aforesaid, on the twenty-seventh day of February, in the year of our Lord one thousand eight hundred and forty-one, the said stockholders, by a resolution duly made and adopted, absolutely refused to
*445] *accept the provisions of the said last mentioned Act, as a part of the charter of the said Bank of Charleston, South Carolina.

By reason of which said several premises, the charter of incorporation aforesaid, and all the powers, authorities, privileges and franchises, in and by the said first mentioned Act of the General Assembly aforesaid, given and granted to the said Bank of Charleston, South Carolina, as aforesaid, have become forfeited to the said State, and are and ought to be forfeited and made void, and of no force and effect in law; and the said charter of incorporation, and all the said powers, authorities, liberties, privileges and franchises ought to be repealed, revoked and annulled. And we being willing that what is just and right should be done in the premises, you and each of you are hereby commanded, that by good and lawful men, of your and each of your respective districts, you give notice to the said Bank of Charleston, South Carolina, to be and appear before the justices of the said State, at the Court of Common Pleas, to be holden at Charleston, in the district of Charleston and State aforesaid, on the first Monday in May next, to show cause, if any cause the said Bank of Charleston, South Carolina, can show, why the said charter of incorporation, and all the powers, authorities, liberties, privileges and franchises aforesaid, in and by the said first mentioned Act of the General Assembly aforesaid, given and granted to the said Bank of Charleston, South Carolina, as aforesaid, should not be forfeited to the said State, and be repealed, revoked, annulled and declared void and of no force and effect in law. And have you this writ before the clerk of the said Court, at Charleston aforesaid, fifteen days next before the sitting thereof. Witness, B. R. CARROLL, Esq., clerk of the Court at Charleston, the twelfth day of April, in the year of our Lord one thousand eight hundred and forty-one, and of American Independence the sixty-fifth.

At which said first Monday in May, in the year of our Lord one thousand eight hundred and forty-one, comes here HENRY BAILEY, Attorney General of the said State, and on behalf of the said State offers himself against the said Bank of
*446] Charleston, South Carolina, of the plea aforesaid; * and the said sheriff, to wit: ALEXANDER H. BROWN, Sheriff of Charleston district aforesaid, now here, returns that he hath in due form of law given notice to the said Bank of Charleston, South Carolina, to be here, on the said day in the said writ mentioned, to show, as by the said writ the said Bank of Charleston, South Carolina, is commanded: and the said Bank of Charleston, South Carolina, being solemnly demanded, appears by PETIGRU & LESESNE, its attorneys. Whereupon, the said HENRY BAILEY, Attorney General as aforesaid, on behalf of the said State, prays judgment against the said Bank of Charleston, South Carolina, and that the charter of incorporation aforesaid, and all the powers, authorities, liberties, privileges and franchises, aforesaid, given and granted unto the said Bank of Charleston, South Carolina, as aforesaid, may be repealed, revoked, annulled, and declared void and of no force and effect in law.

PLEA.

And the said The Bank of Charleston, South Carolina, by PETIGRU and LESESNE, their attorneys, come and make protestation, that there is not any such provision

in the Act of the General Assembly, made on the seventeenth day of December, in the year of our Lord one thousand eight hundred and thirty-four, declaring the bills of credit or promissory notes, thereby authorized to be issued by the said The Bank of Charleston, South Carolina, to be in the nature of a circulating medium, and making the payment of the same, on demand, in gold and silver coin, a condition annexed to the grant of the franchise of being a corporation, and that the matters contained in the said writ of *scire facias* are insufficient in law, and that the said The Bank of Charleston, South Carolina, is not bound by the law of the land to answer thereto; for plea, nevertheless, the said The Bank of Charleston, South Carolina, say: that the franchises conferred by the said Act of the seventeenth day of December, in the year of our Lord one thousand eight hundred and thirty-four, ought not to be seized by the State and taken away from the said The Bank of Charleston, South Carolina, nor the said charter revoked: *because, they say, that after the first day of September, in the year of our [*447
Lord one thousand eight hundred and thirty-eight, that is to say, on the twenty-first day of December, in the year of our Lord one thousand eight hundred and thirty-nine, by a certain Act of the said General Assembly, entitled An Act to extend the time of payment of the last instalment of the increased capital of the Bank of Charleston, South Carolina, it was enacted, that the last instalment of fifty dollars on the increased capital stock of the Bank of Charleston, South Carolina, should be paid at such time as the president and directors might call therefor, as by the said Act, among other things, relation being thereunto had, doth fully appear; by reason whereof, the charter of the said The Bank of Charleston, South Carolina, is confirmed, made good, available and of perfect force, to all the citizens of this State, according to the true intent and meaning of the said Act of Assembly. All which the said Bank is ready to verify, and therefore demand judgment, whether the said charter should be revoked, or the franchise of being a corporation seized by the said State, and so forth.

To this plea the Attorney General, on behalf of the State, demurred generally, and the defendant joined in demurrer.

Judgment of the Circuit Court.

Butler, J. This case is distinguished from that of the State against The Bank of South Carolina, in the particulars set forth in the defendant's special plea, and should therefore be decided on its own separate merits. I am satisfied that the special plea of the defendant is a sufficient and valid bar to the proceedings of the plaintiff; and I therefore overrule the plaintiff's demurrer, and award judgment for the defendant on the plea.

The Attorney General, on behalf of the State, appeals from the judgment of his Honor, and moves that the same may be reversed, and judgment awarded for the State, on the several grounds of appeal taken from the judgment of his Honor in the case of The State against The Bank of South Carolina, which is above referred to by him, a copy *of which judgment and grounds of appeal is hereunto [*448
annexed; and upon the further ground:

That the matters set forth in the plea of the defendant, in the present case, do not constitute a bar to the action of the State.

Curia, per Harper, Ch. If the charter of the defendants was forfeited by the suspension of specie payments in 1837, and the forfeiture were incurred from the time of the act committed, we are of opinion that the Act of 1839, which is pleaded, must be regarded as a waiver of the forfeiture. If the process of *quo warranto* would be a proper one to try the question of forfeiture, it follows of necessity that the forfeiture is regarded in law as incurred from the time of the act committed. The very foundation of the proceeding is, that the defendants are guilty of

usurpation, by exercising their corporate franchise after the act by which forfeiture is incurred.

In the case of *The King* vs. *The City of London*, so much referred to on both sides, and which is the earliest case we have upon the subject, to the *quo warranto*, the city pleaded its charter. To this the Attorney General replied the acts which were relied on as the causes of forfeiture, and concluded "by which the mayor, commonalty and citizens, the privilege, liberty and franchise of being a body politic and corporate, did forfeit, and afterwards, by the time in the information, that liberty and franchise of being a corporation did usurp upon the King;" and according to this was the judgment of the Court. 8 Cobbett's State Trials, 1071. It was objected by Sir George Treby, the City Recorder, that if the defendants were charged with usurpation and not being a corporation, whether by forfeiture or otherwise, the information should not have been against the city by its corporate name, but against particular persons—the individuals composing the pretended corporation. *Ibid.* 1118. To which Sir Robert Sawyer replied, that until seizure they continued a corporation *de facto*. *Ibid.* 1154. Both seem to agree that *de jure*, the forfeiture is incurred from the time of the act committed. Sir James Smith's case is relied upon as tending to show that the *quo* *449] *warranto* is not the proper process, and that the *corporation continues till judgment. The question in that case, as reported in 4 Mod. 58, seems to be with respect to the validity of the judgment against the City of London. Lord Holt is made to say—"A corporation may be dissolved, for 'tis created upon a trust; and if that be broken, 'tis forfeited; but a judgment of seizure cannot be proper in such case—for if it be dissolved, to what purpose should it be seized."

"Therefore, by this judgment in the *quo warranto*, the corporation was not dissolved; for it doth neither extinguish nor dissolve the body politic."

"Whenever any judgment is given for the King, for a liberty which is usurped, 'tis *quoad extinguatur*, and that the person who usurped such a privilege, '*libertat, &c.,*' *nulla tenus intromittat, &c.*, which is the judgment of ouster. But the *quo warranto* must be brought against particular persons." But if the *quo warranto* must be brought against particular persons, it should seem to follow that by forfeiture, the corporation is dissolved both *de facto* and *de jure*. This would be a most dangerous doctrine, especially with regard to banks, whose contracts and transactions with third persons are so numerous. But in Skinner, 311, (where the judgment is more fully reported under the title of the *King* vs. *The City of London,*) nothing of this sort appears, and the judgment is made to turn on a totally different point. It is said, the decision must depend, not on the judgment which was actually entered, but on the recital of it in the Act of Parliament restoring the privileges of the city of London. The statute recites the judgment, "the which is, that the liberty, franchise, and privilege of the city of London, *being a body politic*, may be seized"—instead of "the liberty, &c., of being a body politic." The statute was held to be conclusive, that the body politic continued to exist; for a corporation may continue to exist, though deprived of its franchises.

The case of the *King* vs. *Amery*, 2 T. R. 515, was one in which

there was a judgment on a quo warranto against the City of Chester, similar to that against the City of London—that "the liberties, &c., should be seized" but "*quosque*," until the further order of the Court. Against the judgment it was argued that there could be no judgment *of *seizure* under the *quo warranto;* if any, it should have been a judgment of ouster—that when corporations legally created, [*450 abuse any of the franchises to which they are entitled, or usurp others to which they have no claim, there the information is brought against *the corporation as such*, and their judgment of seizure is given. But when a body of men assume to themselves to be a corporation, by any given name, and an information is brought against them, it must be by their individual names. To which it was replied that the corporate name is only a description of the persons sued; they continue a corporation *de facto* till judgment; and that only can decide whether they be such or not. The Court held that, the corporation not having appeared, the judgment against the city of Chester was final and conclusive, and the King having granted a new charter, the subsequent restoration of the old charter was null and void.

This judgment was reversed in the House of Lords—not on the ground of any irregularity in the process of *quo warranto* or judgment of seizure; but, as I learn from Kyd's Treatise on Corporations, (2 vol. 510—the report of the case is said to be published in two volumes, quarto—) on the ground that the effect of the judgment *quosque* was only to *suspend* the *use* of the corporate franchises, so that the king might appoint a *custos*, but not grant a new charter; and by the charter of pardon and restitution of the old charter, the king's hands were removed. The authority is fully in point as to the process and the judgment.

The judgment of the Court was delivered by Ashurst, Justice, and I cannot regard what is said by him in the later case, of the *King* vs. *Parmon*, 3 T. R. 244, as inconsistent with it, or intended to impugn it. In that case, where an integral part of the corporation was gone, which it had no power to restore, it was held *ipso facto* dissolved. The Judge says, "It was argued that admitting the old corporation to be in a state to be dissolved, that could not be effected without a *scire facias* to repeal the former grant, or a judgment on a *quo warranto*. But I think those modes are only necessary to be pursued in the following cases. A *scire facias* is proper when there is a legal existing body capable of acting, but who have been guilty of an abuse of *the power entrusted to them, &c. And a *quo warranto* is necessary when [*451 there is a body corporate *de facto*, who take upon themselves to act as a body corporate, but who, from some defect in their constitution, cannot legally exercise the powers they affect to use." I do not very well understand what may be meant by "some defect in their constitution," but the whole is said incidentally as matter of argument, to show the absurdity of requiring such formal proceeding to dissolve a body which is already extinct.

All the elementary authorities take it for granted, as the familiar law, that this is the proper process when there has been a forfeiture for abuse, as well as when there was an original usurpation. So it is said 1 *Bl. Com.* 485, that a charter may be forfeited by neglect

or abuse, and "that the regular course is to bring an information in nature of a writ *quo warranto*, to inquire by what warrant the members *now* exercise their corporate power, having forfeited it by such and such proceedings." The same thing is laid down with equal explicitness by *Kyd*, 2 vol. 395, 403–4. So it is said by Justice Story in *Terrett* vs. *Taylor*, 962, 51, "A private corporation, created by the Legislature may lose its franchises by a misuser or nonuser of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto*." The various American cases brought to our view, from New York, from Pennsylvania, from Alabama and Indiana, were proceedings by *quo warranto*, to enforce a forfeiture for abuse, and in none of them is it questioned to be the proper process. In short, I have found no case or authority, in which there is a doubt or suggestion to that effect, or that the continuing to exercise the corporate franchises after an act of forfeiture, is not an usurpation.

Then the bank, though forfeited, in contemplation of law, continued to exist, *de facto*, so as to render its transactions valid. And this is by no means a thing unknown to our law. Such is the familiar case of administration granted, when there is a will and executor; the acts of the administrator are valid until his appointment be revoked. Such too is the case of public officers who have failed to take prescribed oaths. The banks thus existing, the Act *of 1839(*a*) was passed, which pro- *452] vides "that the last instalment of fifty dollars on the increased capital stock of the Bank of Charleston may be paid at such time as the president and directors may call therefor, on notice of one month, published in two or more of the public gazettes in Charleston." The original charter required those instalments to be paid at a specified time. Now it is not possible that any implication could be more absolutely necessary—if indeed it can be called implication—than that by virtue of the Act, the bank shall be and continue a corporation, for the purpose of fixing the time for calling in the instalments, and giving the notice; and of course for the purpose of exercising the other functions to which this is merely accessary, the power is granted indefinitely as to term. But when the *Legislature, by law*, declares that a corporation shall continue to exist, can it be doubted that this is a waiver of a previous forfeiture? To say that a corporation existing by *authority of law*, is not a corporation *de jure*, would be an absurdity in terms. The case of *The People* vs *The Manhattan Co.* 9 Wendall, 351, is an authority expressly in point, that a forfeiture may be waived by a subsequent act of the Legislature, recognizing the existence of the corporation.

I am inclined to think, too, that the adoption by the Legislature of the report of the Committee of Ways and Means, of the 20th Dec. 1837, was a waiver of this forfeiture. It appears from the report that the Governor had communicated to the Legislature the fact of the suspension of specie payments by the banks of the State, with an exposition of the reasons for the step they had taken. This part of the message was referred to the Committee, who reported that they feel satisfied that the Banks are entitled to public confidence, which report was concurred in by both branches of the Legislature. The Comptroller General also communicated the same information to the Legislature. I think this

(*a*) 11 Stat. 42. *Am.*

must be interpreted into an approval of the conduct of the banks. I do not know any particular manner by which a party entitled to a forfeiture may waive it. Whatever is clearly significant of the intention, I suppose, will be sufficient. In *Webster* vs. *Bannister*, *Doug.* 394, the forfeiture of an annuity bond was *waived by parol and giving day to the obligor. [*453 I do not know that the Legislature must waive by law. It may by resolution direct its officer to proceed to enforce the forfeiture; and by parity of reason, it may direct him to forbear and remit the penalty. And certainly, when the pardon or amnesty is once granted, it cannot be recalled. It has passed *in rem actam.* To hold the contrary, would work the utmost injustice to persons who may have become holders of stock on the faith of the legislative amnesty.

After these proceedings of the Legislature, it is scarcely necessary to investigate the question of notice to it of the act of forfeiture. It is ordered that the demurrer be overruled, and the judgment affirmed.

D. JOHNSON and DUNKIN, Chancellors, RICHARDSON, O'NEALL, BUTLER and WARDLAW, Justices, concurred. J. JOHNSTON, Ch, and EARLE, J., absent.

IN THE COURT OF ERRORS FROM EQUITY.

JULIA E. CARMILLE *vs.* THE ADMINISTRATOR OF JOHN CARMILLE, GEO. PRINGLE, ET AL. [*454

Where one in his lifetime was seized and possessed of certain slaves, to wit:—"Henrietta and her four children, Charlotte, Francis, Nancy, John, and Elizabeth, and also Tilly and Mary"—and by deed bearing date 26 February, 1830, for a nominal consideration, assigns to the defendants, P. & C. the said negroes, Henrietta, and her four children (as above named) on the special trust, confidence and condition, that they will from time to time and at all times hereafter, permit and suffer the negroes above named, or any or all of them, and also the future issue and increase of the females, to seek out and procure employment, and to work for their own maintenance and support, and further in trust to allow them the said negroes, &c., to receive and take for their sole use and benefit, all such moneys as they might obtain for their labor or otherwise, after paying to the trustees the sum of one dollar per annum and no more. The other deed purports to convey to the same trustees the slaves Tilly and Mary, in trust, to apply their labor to the use of Henrietta and her children as aforesaid, until her youngest child shall come to the age of twenty-one years, and then to sell the slaves Tilly and Mary, and divide the proceeds between Henrietta and her children, share and share alike. *It was held*,

1. That the deeds were good, and sufficient to vest the title to the slaves in the defendants. That the negroes mentioned, viz.: Henrietta and her children, are still slaves under the dominion of their masters, and must so remain.
2. That if the defendants should give them, under the deeds, the fruits of their labor, it is not unlawful.
3. That the second deed is a good common law conveyance to the defendants of the two slaves, Tilly and Mary, for the use of other slaves.
4. That by the laws of this State, slaves may acquire and hold in possession per-

sonal property (not prohibited to them by Act of the Legislature) with the consent of their master or mistress. And such property is in law to be regarded as the property of the owner of the slave.

Before DUNKIN, Ch., at Charleston, June, 1839.

The following decree was pronounced by his Honor, and will explain fully the facts of the case and the important questions involved.

John Carmille died in July, 1833. After his decease a paper was propounded for probate, as his will. It was dated 17th July, 1832, and by it he gave all his estate to his slave Henrietta, and her children, directing his executors to emancipate them, if it could be legally done and if it could not be done within fifteen years, to send them away, and set them at liberty in some country where it could be done. The paper was rejected, on the ground, that subsequent to the execution, Carmille had married, and had issue. Letters of administration were granted to William Wightman, and upon his death, to Thomas F. Purse. It appeared, *455] from the testimony, that on the 1st or *2d of March, 1830, Carmille was married to Margaret Arnott, with whom he lived for about ten months, when his wife died, leaving the complainant surviving her, the issue of the marriage.

Not including the slaves, hereinafter to be mentioned, the personal estate of the intestate consisted of some articles of household furniture, &c., and an outstanding debt; amounting, altogether, to between six and seven hundred dollars. The debts due by the estate amounted to about $1000. He left also a house and lot on Meeting-street road, and one hundred and eleven acres of land on Goose Creek. In addition to this property, the intestate, at the time of his death, was in possession of the slave Henrietta and her children, (four mulattoes,) Charlotte, Francis, Nancy, and John, and Elizabeth, the child of Nancy, and also of Phillis, or Tilly, and Mary. On the death of the intestate these slaves went into the possession of the defendants, George Pringle and Philip Chartrand, and are held by them under deeds from John Carmille. The object of this bill is to set aside those deeds, and subject the slaves, in the first place, to the payment of the debts of the intestate, and to have the surplus paid or delivered to the complainant, as next of kin. The first deed bears date the 26th February, 1830, and for a nominal consideration, assigns to the defendants, Pringle and Chartrand, "the said negroes, Henrietta, Charlotte, Francis, Nancy, and John," on the special trust, confidence and condition, that they will, from time to time, and at all times, hereafter, permit and suffer the negroes above named, or any or all of them, and also the future issue and increase of the females, to seek out and procure employment, and to work out for their own maintenance and support; and further, in trust, to allow them, the said negroes, &c, to receive and take, for their sole use and benefit, all such moneys as they might obtain for their labor, or otherwise, "after paying to the trustees the sum of one dollar per annum, and no more." The second deed bears date on the same day with the former deed, refers to it, and purports to convey to the same trustees the slaves Tilly and Mary, in trust, to apply their labor to the use of Henrietta and her children, until her youngest child shall come to the age of twenty-one years, and then to sell the slaves Tilly and Mary, and divide the proceeds between Henrietta and her chil-

dren, share and share alike. These deeds were not proved, or recorded, until 22d July, 1833, after the death of Carmille.

*It appears to the Court too clear to admit of argument, that the bill of sale of Henrietta and her children, is an undisguised [*456 attempt to evade the law of this State, forbidding emancipation, "a law, which," as was said in *Fable* and *Brown*, "however harsh it may appear to those who have no opportunity of forming a judgment on the subject, is founded on principles of true humanity, as well as just policy." The trusts created by this deed, cannot be carried into execution without effectually violating the policy, and defeating the objects of the law. The trusts must, therefore, fail. The consequence is succinctly as declared by Lord Elden, in *Morice* vs. *The Bishop of Durham*, 10 Ves. 535, "If the testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take." The object of the second deed was merely to carry into effect and complete the purposes of the former deed, and must fall with it. 2 Story Eq. 44, 3. The slaves Tilly and Mary, are to be held in trust for Henrietta and children, who are also slaves. "The the title is not changed, but the title and possession must be referred to the Master." *Fable* vs. *Brown*, 2 Hill's C. R. 397.

It is ordered and decreed, that the negroes mentioned in the pleadings, be delivered up by the defendants, George Pringle and Philip Chartrand, for the purpose of being administered as part of the estate of John Carmille, deceased; that the accounts of William Wightman, deceased, the former administrator, and of Thomas F. Purse, the administrator *de bonis non*, of John Carmille, deceased, be referred to the Commissioner of this Court, to report thereon. Parties to be at liberty to apply for such further orders as may be necessary for the final settlement of the estate.

The defendants appeal in this case, on the grounds:

1. Because the remedy is at law, and the bill ought to have been dismissed.
2. The right of action is in the administrator, and not in the heir.
3. The deeds to defendants were valid, and if the trust failed, the conveyance became absolute.
4. If the title was defective under the deed, the defect was cured by the lapse of time.
5. That under the case of *Frazer* vs. *Frazer*, 2 Hill's C. R. 313, *the [*457 defendants have a right to send the negroes out of the State, for the purposes of emancipation.
6. That the decree is erroneous, and ought to be rectified.

GRIMKE, for the motion. The first deed bears date the 26th February, 1830. By the *premises* it bargains, sells and delivers to Pringle and Chartrand, Henrietta and her four children. To have and to hold the said negroes with their issue unto the said Pringle and Chartrand, and the survivor of them, and the executors, administrators and assigns of such survivor, forever. Then follows, in the "terms of stipulation" a condition, which, in the language of the chancellor, we will admit to be an undisguised attempt to evade the law.

The second deed bears date on the same day, between the same parties, and in like manner bargains, sells and delivers to the said Pringle and Chartrand, two negro slaves, Phillis and Mary. To have and to hold the said negroes, with their issue, unto the said Pringle and Chartrand, and the survivor of them, and the executors, administrators and assigns of such survivor, forever. Then follows, in the "terms of stipulation" a condition, that the wages of said slaves shall be applied to the use and benefit of the said Henrietta and children.

The case then is simply this. By the premises of the deed the bargain and sale

is made in positive and distinct terms. By the *habendum* the estate created is absolute in the grantees, viz.: "to them and the survivors of them, and the executors, administrators and assigns of such survivor, forever. To these premises and to the *habendum*, which are perfect and complete, the grantor has chosen in the "terms of stipulation" to embody a condition, which (for the sake of argument) he knew could not be performed without violating the existing law.

The condition is subsequent, not precedent. By the execution of the deeds, the estate became immediately vested.

The words of the deeds in the "terms of stipulation" are—"In trust nevertheless to, for and upon the special use, trust, confidence, and condition." Of the terms here used, the word condition is the one of most extensive signification, and comes last.

The rule is, that whenever a word of limited signification is used last in a sentence, and a word of extensive signification first, the last controls and restricts the first. But where the word of most extensive signification comes last, it en-
*458] larges all preceding *and more limited words, and in fact merges them all in itself. By this, which I take to be the true rule both in law and criticism, we must read the clause as if it contained no other word than the word condition.

To the facts above stated, it is only necessary to add that under the issue ordered by the Court of Errors at February Term, 1840, the jury by their verdict established the due execution and delivery of the deeds.

Out of these facts arises the question, what is the law?

By the civil law the complainant would stand no chance. But what says Lord Coke, the oracle of the law, and indeed every other judge or elementary writer in England or America, from his time to the present day. "That where the condition is illegal, the condition is void and the estate is good."

"Conditions against law are void," 1 Just. 206, 20, "Conditions repugnant to the estate, impossible, &c., are void, and if they go before the estate, the estate and condition are void; if to follow it, the estate is absolute, and the condition void. 1 Just. 206, 9. Rep. 128."

The reason why a condition contrary to law is void, and the deed good, is simply, that there had been no violation of law in the execution of the deed, and could be none until the performance of the condition was attempted or accomplished; for this reason the law merely relieves the party from the performance of the condition, and leaves the deed itself absolute in its original terms. The law can only, and seeks only to avoid that part of a deed, which being either *mala in se*, or *mala prohibita*, interferes with its enactments. That portion of the deed being void, or mere surplusage, leaves the rest, or legal part, of course, in full force and virtue. Even the Act of 1820, expressly enacted with a view to this special matter, does not pretend to impair the validity of the deed, but merely prohibits a particular act.

In *Ingraham and Porter*, 4 McC. 200, the court say, where the *habendum* of a deed is wholly inconsistent with and repugnant to the premises, so that they cannot stand together, the *habendum* must be considered as void, and if the premises pass any thing the grantee shall hold.

Now in the deed executed by Carmille, as in the one in the case of Ingraham and Porter, executed by Daniel Porter, the property is given absolutely and in *presenti*. In Porter's case the *habendum* was inconsistent with the premises, and
*459] the court *therefore declared that *it* could not take effect. But in the case now before the court, the *habendum* is consistent with the premises, and they are both perfect and complete; the estate conveyed there does take effect, by vesting in Pringle and Chartrand a present interest, and an absolute estate; and that estate untrammelled and uncontrolled by any illegal condition, inserted in the terms of stipulation.

The formal parts of a deed are, 1. The premises. 2, The *habendum*, which determines what estate or interest is granted. 3. The terms of stipulation, which prescribe the conditions or terms upon which a grant is made. 4. Warranty. 5. Covenants. 6. Conclusion.

The first part of a deed has priority in law as well as in fact. 3 Dyer, 272; 14 Viner, 51, 56, 100, 141, 145.

Judge HUGER, in delivering the opinion of the Court of Appeals, Harp. L. R. 493–4, uses the following language,—"Where the premises of a deed are not complete and perfect, resort must be had to the *habendum* to ascertain the intention of the parties. It may then limit or extend or frustrate the premises. But when the premises are complete and perfect, and the *habendum* is at variance with them, and they cannot stand together, the *habendum* is void," not the deed.

When Carmille executed the deed, he knew the law. I don't mean merely the common presumption, that he, like every other man, knew the law, but his will shows that he was fully aware of the Act of 1820, and his counsel who drew the deeds, advised him of their effect. He knew then that the deed he executed was a deed of gift, conveying and intended to convey an absolute and indefeasible estate to the grantees. By the deeds then, and under our own decisions, as I shall presently show, Carmille divested himself, his heirs and assigns, of all interest and estate which he held in the property, and passed to the grantees an interest in *presenti*, which might have been levied upon and sold by the sheriff, for the debts of Pringle or Chartrand, or which, under certain circumstances, might have been attached by their creditors.

Carmille left property, besides these negroes, amply sufficient to pay his debts. His creditors are not claiming.

But suppose the creditors of Pringle and Chartrand were before the court, under an issue made up to try the right of property, as between them on the one part, and Carmille in his life *time, or his heir or legatee, after his death, on the other. Can there be a doubt as to what would be the instruction of the court to the jury, under the evidence as now adduced? [*460

Suppose Carmille in his lifetime, had brought an action of trover against Pringle and Chartrand for these negroes. Would not he have been estopped by the deeds? If he would have been, then all those claiming under him are so likewise. And allow me to ask the attention of this court to the opinion of the Court of Appeals, as delivered by Mr. Justice O'NEALL, in the case of *Cline and Caldwell*, 1 Hill, 425, 6, in which opinion the present Judges, DAVID JOHNSON and WM. HARPER, concurred; and under the law as there laid down, how is there any possibility of this court coming to the conclusion that the present claimant can recover. What says the court in that case at p. 425.—"That the deed from *Jos. Caldwell* to *Cato Gallman* was good as against the grantor, and all those claiming as volunteers under him, even if it had been intended as an evasion of the Act of 1820."

Again, at p. 426.—"The defendant, his principal and the intestate, are all in the place of *Caldwell*, and take no other or better title than he had himself; after he had conveyed to *Cato Gallman*, he had *none*, and they of course had *none*." Just so here the complainant can take no other or better title than Carmille himself had, after he had conveyed to Pringle and Chartrand, the defendants. He had *none*, and she of course has *none*. How then, I would most respectfully submit, can her claim to this property, in which it is decided she has no title, be sustained?

It is said, however, that to sustain the deed is contrary to the policy of the country, and at war with our peculiar institutions. With this the court has nothing to do. The province of the Bench is to declare what the law is; not what it ought to be. But I deny the position as to the policy of the measure What is the court asked to do? What is the question before the court? Is it whether these negroes are bond or free? No. It is simply whether they are the slaves of the plaintiff, or the defendants. This is the only issue made by the pleadings and by the evidence, and can the court travel beyond these, and base their decision on what may or may not be presumed to be the intention of the parties, after the judgment of the court is pronounced? Besides, if presumptions are to have any weight, I *would ask of the parties before the court, which is it most likely would be most willing to carry out this attempt to evade the law; viz., whether the defendants, perfect strangers to the negroes and to Carmille, would be most anxious to fly in the face of the law of the land, or whether the complainant would be willing to hold in the bonds of servitude, and bind with the chains of slavery, two brothers and sisters of the half blood? So [*461

much for the morale and policy of the case, with which, however, we have nothing to do.

Take the case of A, the owner of a menagerie of great value, composed of animals *ferœ et ferocissimæ naturæ*, and he was to execute a deed thereof to B, in the language of the premises and *habendum* of this deed, and in the terms of stipulation he was to insert words to the following effect, viz.: "In trust, nevertheless, and to, for, and upon the special use, trust, confidence, and condition" that the grantee within ten days should turn the wild beasts out in the public square. The deed is signed, sealed, and delivered, and the grantee takes possession, and after the expiration of the ten days he gives the grantor notice that he intends to keep the animals, and to exhibit them for his own benefit, and proceeds to do so. A then brings his action vs. B. The deeds are produced, and the Court find B in possession of the deeds and of the property, (as in the present case.) What, I would ask, would be the judgment of the Court?

The fact is, that in the deeds now before the Court, the premises and *habendum* being "perfect and complete," the terms of stipulation must be regarded merely as surplusage, being nothing but the expression of a wish or a direction, which the party at the time of making it, knew to be idle and useless. The deeds, therefore, are valid to pass the estate, and the negroes are the slaves of the defendants. A gift, if you please; but where is the law which says a man shall not give away his own property? and a gift, even in exclusion of the legal heirs; but show me the statute which prohibits a man, either by deed or will, from disinheriting all or any of his children?

The case of the *Bishop of Durham* in 10 V. is relied on, and is indeed the foundation of the complainant's argument.

Now, I would respectfully submit that the decision in that case is no authority in this. It may be very good law for Westminster Hall, but not for this country. In England, chancery makes and models men's wills to suit their own notions of
*462] *the law of the land and the policy of the government, and vouchsafes to allow no trust but such as they can meddle with, and execute or annul. The grand feature of our government and the ruling principle of our jurisprudence is, that the magistrate does not interfere with the private concerns of the individual.

The reasons as connected with the policy of the government, not the people, which influence the judgment of the Court at Westminster Hall, do not exist in this country. Our Chancery is not the Chancery of that Bench, and indeed English law has nothing to do with this case, and the less weight it has in this country, in this or any other case, the better. We have never departed from the beaten path of British jurisprudence but the effect has been to elevate the standard and improve the condition of the law. What they gave us as a sealed book, we have made an open letter. The temple of justice here is dedicated, not to a king and a great landed aristocracy, but to the sovereign people.

The law of the land here is, that the owner of property has the right of parting with the possession, and either by deed or by will, of divesting himself, his heirs and assigns, of all title and estate therein. Where is the statute here, or even a decision of our courts, which gainsays this position; and in England where gifts in mortmain were against the policy of the government? But even there, did the Court declare those gifts void until the statute had said so?

In this State, where a man gives to another, for an object which is contrary to law, the Court of Appeals, in *Cline and Caldwell*, and *Linam and Johnson*, have said, *totidem verbis*, the title has passed from him and his heirs for ever. Where then is the descent to the heir or the title to the administrator?

The Court then, under the law, as shown to be settled by their own decisions, cannot say the heir shall take, nor can they make a title for the administrator. They must then leave the property where they found it, in the hands of the grantee; he taking it, as both grantor and grantee knew, at the time of the execution of the deed, under a condition or trust, if you please, which being contrary to law is void, and the execution of which would subject him personally to the pains and penalties of the law, if any, in such case made and provided.

The sole object of the present proceeding is to revert the title to the property
*463] in the administrator or the heir, which by the cases *above quoted it has been shown was out of the ancestor at the time of his death. This clearly

could not have been done for the ancestor, if he had asked it in his lifetime, and it therefore cannot be done for the heir after his death; it is beyond even the extraordinary powers of the Court of Chancery. And, if it could have been done for the ancestor, where would have been the reason or sense of the Act, which would have given property back to a man who had shown himself, in the very act by which he divested himself of the title, viz., to use the language of the chancellor, by an undisguised attempt to evade the law, as utterly unworthy of the trust and responsibilities which the possession of property necessarily imposes?

But again, the case of the Bishop of Durham is a case of a trust under a will; this is the case of a condition in a deed. The Bishop came into court with the property in his possession, as sole executor. It has been urged that this is a trust, not a condition; now although every condition is not a trust, yet every trust is a condition. But as I have said, this is the case of a will; so are the cases of *Bostick and Walker*, *Fable and Brown*, *Hovey and Deas*, *Monks and Field*, and *Rhame and Dangerfield*. But the cases of *Linam and Johnson*, and *Cline and Caldwell*, were cases of deeds, and the deeds were sustained.

And again, the case of the Bishop of Durham don't apply, even admitting that its authority has been, as is too often the case, followed by American judges, merely because it is English law.

The question which is made in this case could not legitimately have arisen in that. In that case, as is stated in 9 Ves. p. 397, "The Bishop, by his answer, expressly disclaimed any beneficial interest in himself personally." A case is only authority in reference to the issues made by the pleadings, and can be regarded as settling no other principles than such as are involved in those issues.

And I almost feel warranted in saying, that if a case like that of the Bishop of Durham came up before American judges for their consideration, and if it could receive, as it would deserve, a fair and candid deliberation, unbiassed by English law, and untrammelled by English decisions, that the judgment of an American court would be the reverse of the Lord Chancellor's decree.

Another aspect in which this case is to be viewed is presented by that portion of the bill which prays that the deeds may be set *aside, and one ground taken is, "that the same are void and unavailing, so far as they dispose of [*464 more than one-fourth part of the clear value of the estate of the said John Carmille, after payment of his debts, under and by virtue of the Act of Assembly, entitled, 'An Act to provide for the maintenance of illegitimate children, and for other purposes therein mentioned,' inasmuch as the said deeds were made for the use and benefit of a woman, the said Henrietta, with whom Carmille lived in adultery, and for the use and benefit of his bastard children by her." This ground, it seems to me, may be dismissed with a single remark. In the first place, at the time of the execution of the deeds, Carmille had neither wife nor child; and secondly, Henrietta being a slave, his children by her are not bastards in the eye of the law; the A. A. then of '95 does not apply.

The next ground taken in the bill is, that these deeds ought to be set aside, and the property ordered to be delivered up to the administrator for the benefit of the heir. First, because the deeds are voluntary and without consideration; and second, because they are on trust void in law.

The Court of Equity does sometimes interfere on behalf of creditors, but it has seldom happened, if this is not the first time, that application has been made to the extraordinary powers of a Court of Chancery on behalf of a volunteer claiming under the grantor, to set aside a voluntary conveyance.

A voluntary transfer by deed of a chattel in trust is valid, as between the parties, without any consideration appearing. *Brue* vs. *Winthrop*, 1 John. C. R. 329.

A voluntary deed of settlement fairly made, is always binding in equity upon the grantor, unless there is clear and decisive proof that he never parted, or intended to part, with the possession of the deed; and if he retains it, there must be other circumstances besides the mere fact of his retaining it, to show that it was not intended to be absolute. *Souverbye* vs. *Arden*, 1 John. C. R. 240.

In the case now before the court, the deeds and the property are both found in the possession of the grantee. Besides, the deeds which bargain, sell, and deliver this property to the grantees, bear date on the 26th February, 1830, on which day

the verdict of the jury has established their due execution, and the bill in this case was not filed until the 16th of May, 1835, a period of more than five years.

*465] *A voluntary conveyance or settlement, though retained by the grantor in his possession until his death, is good. 1 John. Ch. Rep. 329.

There are many other cases which might be referred to, but it is useless to multiply authorities on this point.

The Court of Equity here, like the English Chancery, has been known to interfere with people's wills, but not with *deeds*, except in cases of fraud, mistake, or where there is great equity. Now this is clearly no case of mistake, nor can we discover any very great equity in the application which is made, on behalf of one child of Carmille, to obtain a decree declaring his four or five other children slaves, and ordering them to be sold.

Is it then a case of fraud? There is no fraud as to Carmille's creditors, for there is no proof that he was in debt at the time he executed the deeds, nor does it appear that they were made with a view to future indebtedness. There could be no fraud as to the heir, for Carmille was not even married at the time.

"To invalidate a conveyance, the party must allege and prove it to be fraudulent," as said by the court in the case of *Jones and Briggs* vs. *Blake and wife*, 2 Hill's Ch. Rep. 629, at p. 636.

In the case of *Smith and Henry*, 1 Hill, p. 16, the court declared the deeds void. But that was done on behalf of creditors, and for their benefit. Here the creditors are not parties, except incidentally, as represented by the administrator, who is one of the defendants, and even he is not claiming on their behalf, for it is manifest that the estate of the intestate, exclusive of these negroes, is amply sufficient for the payment of his debts; at any rate, if there be a deficiency it ought to have been made to appear, but it is in fact not even alleged.

The rule of the court always has been to support rather than destroy an instrument that has been fairly and solemnly executed, and I would respectfully submit that the bill ought to be dismissed as to the defendants Pringle and Chartrand.

1st. Because the complainant, as against them, having made out no case either of fraud, mistake, or great equity, sufficient to impair the validity of the deeds, they must stand.

2d. Because her claim is barred by the statute of limitations, more than five years having elapsed from the date of the deeds, viz., 26th February, 1830, to the filing of the bill on the 10th May, 1835.

*466] 3d. Because the complainant could take no other or better *title than Carmille himself had, after he had conveyed to Pringle and Chartraud; he, under the cases of *Cline and Caldwell*, and *Linam and Johnson*, had no title, and she of course has none. She, therefore, having no interest, cannot sustain the bill.

Ashby, for the motion also, said, 1st, The conveyance is absolute; it is a gift. Cited 9 Ves. 232; 9 Ib. 403. Gift for a horse would not be a trust, Dud. 220. What difference is there between a gift for a slave and for a horse? both are chattels, 10 Ves. 536; Co. Litt. 207; 2 B. C. 156, 157; Fonb. Equ. B. 1, c. 4; 2 Wilson, 341; 11 Mass. 374; 2 B. & Ald. 368.

A party shall not avoid his own deed on account of his own fraud. 2 Ves. Jr. 116; 3 P. Wms. 236; 6 Ves. 747; 2d ground, 7 Stat. at Large, 443; 2 Ib. Act 1820, 139; Bin. Rep. 196; 1 Hill C. R. 134; 2 Hill C. R. 313; 3 Leigh, 492; 8 Cranch, 135; 5 Page, 114; 3 B. C. 271; 1 Strange, 447. A bequest to slaves is not void.

Mr. Bailey, contra, cited Lewer on Trusts, 175; 22 L. Lib. (New Series,) 89. Is the trust void or unlawful? Cited 2 P. Wms. 361; 1 Ves. 108; 3 Dou. 194; 1 S. & S. 290; 2 Ves. & Beam. 294; 18 Ves. 463; 3 M. & R. 262; 1 E. 262; 1 Ib. 508; 6 Ves. 52; 9 Ves., *Morrice* vs. *Bishop of Durham;* B. Ab. Tit. Con. 399; 97 Law Lib.; 10 Ves. 527. If he says, I give in trust, and it cannot be ascertained or executed, it is for the next of kin, 328. 1 Sch. & Lef. 22 Law Lib. 84; 2 At. 156; 6 Ves. 68. A bill filed for the discovery of an illegal trust, a demurrer will be sustained. 3 M. 399; 2 B. 209; 1 Vern. 59, decides that equity will not enforce an illegal trust. 1 Bailey, 632. There can be no emancipation until the negroes are turned loose.

The Act of '20 makes the deed void. 2 Hill C. R. 304; 1 Bailey, 632, it was supposed had decided this very question.

The second deed, the first deed being bad, must be so too. 2 Devx. E. Cas. 440; 1 Ib. 493; 1 Dev. L. Rep. 189; 2 Law Repository, 557; 2 Hawk. 120.

The A. A. 1841 settles the question. It is retrospective in its operation. 1 Kent's Com. 408, 409, 455.

Hunt, in reply, said the law was not retrospective, but prospective, and admits the law as it formerly was. The legislature have no right to pass such an Act, if it is regarded as retrospective.

Mr. Hunt contended that the Act of '20 was prospective by *every word. [*467
3 McC. 93. All laws ought to be prospective. There is not one of the authorities of the cause on the other side that covers this case. In any point of view he contended the deeds were good. The Court of Equity does not decree for the distribution until administration.

As long as the statute is unchanged, there is no illegality in the trust. Every resulting trust must arise *eo instante* with the execution of the deed.

Curia, per O'NEALL, J. The case of *Morrice* vs. *The Bishop of Durham*, 9 Ves. 399, and the same case, 10 Ves. 521, was a trust to dispose of the ultimate residue of the testatrix's estate to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of; and the Bishop was appointed sole executor. The master of the rolls and the Lord Chancellor ruled that this bequest was a trust, and conferred no personal benefit on the legatee; but that it was too indefinite in its creation, and could not therefore be executed; and that as it was an estate undisposed of, in the hands of the executor, a trust resulted for the next of kin. From this summary of that case, it will be seen that it cannot reach this case. For there, that was a disposition by will, and the fund was in the hands of the executor, whose whole estate in equity is regarded as upon trust and confidence. So too the trust was not so declared that the objects of the testatrix's bounty could be ascertained from the will, and hence it could not be supported. The case before us stands upon deeds executed and taking effect in the lifetime of the intestate, and the case must be considered as if the intestate was himself the complainant, asking that the deeds should be set aside. Without appealing to foreign adjudications, our own conclusively show that such a bill could not be sustained. For the complainant there would stand upon this footing, that he claimed to be relieved from his own act done in fraud of the law. Such a notion has no countenance any where. That the administrater, and consequently the distribntee, seeking to avoid their intestate's deed for fraud, actual or legal, on his part, must claim in his right, and cannot have any superior equities, have been so often decided, that it is not necessary to cite authorities to prove it. Looking at this case in this point of view, there could be no difficulty in saying the complainant cannot recover. But I think the case deserves to be examined in *another aspect, and I am satisfied [*468
there is nothing in any point of view, in which I am able to regard the case, which ought to defeat the deeds. The Act of 1820(*a*) (Acts of '20, page 22) merely declares "that no slave shall hereafter be emancipated but by the Act of the Legislature." Here it will be observed, that the Act does not declare a deed conferring emancipation void. It cuts off emancipation altogether, except by Act. If emancipation

(*a*) 7 Stat. 459. *An.*

depended upon the execution of the deed alone, then the deed being wholly inoperative, the slave in such case would remain the property of the grantor, and no harm would be done. But the Acts of 1820 and 1800(*a*) are regarded in *pari materia;* and when so construed, they make this legal provision, that a slave cannot be emancipated *in this State,* "*but by the Act of the Legislature,*" and if emancipated without an Act, that then such slave so emancipated, shall be liable to seizure and conversion to his own use by any person. *Frazier* vs. *Frazier*, 2 Hill's C. R. 304. *Johnson* vs. *Linam*, 2 Bail. 137. To constitute an emancipation, something more than the execution of a deed is necessary: there must be a "parting with the possession of the slaves by the owner or owners," and thus "permitting them to go at large and act for themselves." *Lenoir* vs. *Sylvester: Young* vs. *The Same*, 1 Bail. 642. An invalid attempt to emancipate, so long as the possession remains unchanged, or the slave is in the possession of a *legal owner*, does not subject him to seizure; *Cline* vs. *Caldwell*, 1 Hill's Rep. 423. These principles have the sanction of so many cases decided by our own Court of Appeals, that I suppose they will be regarded as settled law. Having in a greater or less degree participated in the decision of them all, I will not now attempt to fortify them by any other reasoning than such as is contained in the judgments pronounced in them.

Taking the law to be as I have stated it, how can it be pretended by the distributee of the donor, that slaves which by him have been conveyed to others, upon the trust and confidence that they would suffer them to work out their own maintenance, *upon the slaves paying an annual hire of one dollar*, are to be regarded as emancipated contrary to the Act of 1820? They are still, to all intents and purposes, slaves. The persons to whom they are conveyed (Pringle and Chartrand) have the right to govern and protect them. The hire which they pay, however, inconsiderable, is a constant recognition of servitude. At law, there never could be a pretence that the slaves were not the property* of Pringle and Chartrand, for at law the trust would not be noticed, *unless it had been executed* by emancipating the slaves. *The State* vs. *Rhame and others*, Dudley's Law Rep. *Rhame* vs. *Ferguson and others*, Rice's Rep. 196. But if it could, then it is equally clear that the donor and those claiming under him, could not at law avail themselves of this objection. *Cline* vs. *Caldwell*, 1 Hill, 423; *Chappell* vs. *Brown*, 1 Bail. 528 It is only in equity that the trust can be looked to, and there the question arises which is now made, is the trust unlawful? and which, as I have already shown, would (if it were) constitute no ground upon which the deeds could be set aside. The distinction is, where any thing is to be done to enforce an unlawful trust, equity will not set it up or enforce it, or in any way aid its execution, even against the party creating it. But where the case is reversed, and the donor comes to be relieved against it, his position, as the party perpetrating the unlawful act, closes the Court against him, and he is left where he ought to be, to stand on *the law;* if that help him, it is well; if not he is punished, as he deserves to be. Had the Act of 1820 declared all deeds, upon trust, for the benefit of slaves, or intended to secure their freedom, void, then the parties repre-

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(*a*) 7 Stat. 442, § 7, 8, 9.

senting the intestate would have had no difficulty. For in that case they could have rested *on the law*, and succeeded. But here their misfortune is, that there is no such provision. The utmost which can be contended for is, that the slaves have been emancipated contrary to law. For Pringle and Chartrand have the actual possession, and may, I suppose, have suffered the slaves to work out their own maintenance, paying an annual hire of one dollar.

Admit that to be emancipation, what is the consequence? Not that the slaves go back to the donor, but that they are liable to capture; and equity has no right to say any thing else, for such is the *lex scripta*. But the question whether the trust is lawful, is worth examination. I confess I have never been able so to regard it. The object of the Act of 1820, was not to deprive a man of the right to do with his own as he pleases, but to prevent him from conferring freedom "within the State" upon a class of people, as to whom her policy demands that they should be slaves within her limits. If the deed, construed with its trusts, still makes the slaves of the donor, the slaves of the donees, the fact that he has desired that they should give to them the fruits of their labor, cannot be unlawful. They still are slaves chattels *personal, they still [*470 are under the dominion of masters, and must so remain. For if Pringle and Chartrand ever relax their hold upon them, and suffer them to go at large and act for themselves *without their restraint, actual or constructive*, they would be liable to seizure, and would become the slaves of the captors. Kindness to slaves, according to my judgment, is the true policy of slave owners, and its spirit should go (as it generally has) into the making of the law, and ought to be a ruling principle of its construction. *Nothing will more assuredly defeat our institution of slavery, than harsh legislation rigorously enforced.* On the other hand, as it hitherto has been, with all the protections of law and money around it, it has nothing to fear from *fanaticism abroad or examination at home*. If it was so that a man dared not make provision to make more comfortable faithful slaves, hard indeed would be the condition of slavery. For then no motive could be held out for good conduct; and the good and the bad would stand alike. Such has never been the rule applied to our slaves, and such I hope it never will be. I am satisfied that there is nothing unlawful in the trust of the first deed, and if it be necessary to place the case on that ground, the Court are prepared to so rule. On all the other grounds, however, previously considered, we are satisfied that the deed is good and must have effect. The second deed is also, I think, good and valid. The only thing which could effect it would be the unlawfulness of the trust, if it be unlawful. It is a good common law conveyance to Pringle and Chartrand of two slaves, for the use of other slaves conveyed to them. In such a case Pringle and Chartrand *having the possession*, have the right to say, it is a naked conveyance to them; and that the trust is mere matter of advice and recommendation, which they may or may not regard. But suppose the trust is to be noticed, then it would be a gift to the slaves of Pringle and Chartrand, which is, I think, a gift to the owners. According to *Fable* vs. *Brown*, 2 Hill C. R., 378, such a gift, even by way of devise, would prevail in equity. I do not agree to the reasoning of that case, however ingenious and able it may be. I concurred in the result merely. For I

hold that the personal property of the slave is the property of the master, and that anything personal given to the slave is given to the master; and this I understand to be the opinion of the Court of Errors. Our legisla-
*471] tive Act of 1740, § 34, P. L., 121, shows that *unless prohibited by Act, slaves might, by consent of the master, acquire and hold personal property, and that even in prohibited cases, a particular course altogether different from *escheat* must be pursued to subject the property of the slave to forfeiture. Our decided cases, with the exception of *Fable* vs. *Brown*,(*a*) and the guardian of *Sally* vs. *Beatty*, 1 Bay, 260, acknowledge the right of the owner of a slave to all his or her acquisitions. The case of the guardian of *Sally* vs. *Beatty*, denies the right of the owner, under special circumstances, to the acquisitions of a slave, and sustained the freedom of a negro, purchased by a slave out of her own earnings. That case goes further than I desire to go; but it is ample authority to prove, that by the law of this State a slave might acquire *personal property*, and that such a thing as an escheat was not an incident of it. The case of *Hobson* vs. *Percy*, 1 Hill, 277, holds that a master in possession of the personal property of his slave, may maintain trespass for an immediate and forcible injury done to it. That case was for an injury done to an article of property, which by the Act of 1740, § 34, slaves are prohibited from owning, and yet being in the possession of the master, it was regarded as his property. Looking back over our legislation, and our decided cases, and the usages of our people, I think that we are well sustained in saying *that a slave may acquire and hold in possession personal property, (not prohibited to him or her by Act of the Legislature) with the consent of the master or mistress, and that such property is in law to be regarded as the property of the owner of the slave.* Both deeds are therefore good, and must be sustained, unless by the Act of 1841, (11 Stat. at Large, 154,) entitled "an Act to prevent the emancipation of slaves, and for other purposes," they are rendered inoperative. That Act has been supposed to be retrospective, but on carefully considering it, I think all its provisions are future, and I rejoice that they are so. For I should have thought it a stain upon the purity of our legislation, if it had been true that the Act had been passed to defeat vested rights.

That such an Act would have been contrary to our own constitution, which has declared that "no free man shall be disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty or property, but by the judgment of his peers, or the
*472] law of the land," seems *to me to be too plain to admit of argument. The motion to reverse the circuit decree is granted, and the complainant's bill is dismissed.

JOHNSON, HARPER, RICHARDSON, EVANS, EARLE, and BUTLER, CC. and JJ., concurred. WARDLAW, J., absent at conference.

JOHNSTON and DUNKIN, CC., did not sign the opinion.

(*a*) Infra, 487; 8 Rich. 32; 2 Rich. 425.

Besides the cases cited in this case, see *Skrine* vs. *Walker*, 3 Rich. Eq. 267; also, *Vose* vs. *Hannahan*, 10 Rich. 465; *Escheator* vs. *Dangerfield*, 8 Rich. Eq. 95; *Dougherty* vs. *Dougherty*, 2 Strob. Eq. 63; *Guilmette* vs. *Harper*, 4 Rich. 190; *Vinyard* vs. *Passalaigue*, 2 Strob. 536; next case; Act of 1841, 11 Stat. 154. *An.*

IN THE COURT OF ERRORS.

Mary Bowers et al. *vs.* Thomas B. Newman.

1. A free person of color, by the laws of this *State*, may take and hold, convey by deed, dispose of by will, or transmit to his heirs at law, both real and personal estate.
2. A slave may acquire property, but as he cannot hold, it inures to the master.
3. Freedom, when bestowed upon a slave by will, is usually spoken of as a legacy, which requires the assent of the executor, as other bequests. But should the executor withhold his assent to the legacy of freedom to the slave, the heir-at-law cannot retain him in slavery; for, upon the death of the testator, his right of freedom vests, subject only to be held by the executor liable for the demands of creditors.
4. After the lapse of twenty-eight years, the assent of an executor to a legacy of freedom will be presumed, and the claim of creditors satisfied or barred, and the possession of the slave (so bequeathed her freedom) of a tract of land also devised to her by the testator, and which she held undisturbed and in quietness, is sufficient to give her a title to said land, as a free person of color, against the heir-at-law, and all the world.
5. By the Act of 1824, it is enacted, that every "gift of land by devise shall be considered as a gift in fee simple, unless such construction be inconsistent with the will of the testator, expressed or implied." The word "*hereafter*," in the first part of the section, is held to relate to the time of adjudication, in connection with the word "*considered*," and not to the date of the devise.
6. Where the testator by his will devises in consecutive clauses, first to Judith, then to Barbara, each one-half of certain lands containing —— acres, to themselves for life, with the power of disposing, and in default with remainder over; and afterwards, by a codicil to said will uses the following language: "I do hereby revoke that part of my will wherein I bequeathed to the within-named Judith and Barbara the three tracts of land between them," and afterwards continues: "I bequeath to the said Judith the place whereon she now lives, adjoining John Newman's land, containing three hundred acres, under the *contingencies, limitations, and restrictions mentioned in my said will*," *and* "I revoke that part of my *said will* wherein I leave to the said Barbara that land below Silver Bluff, being a part of three tracts of land, and in lieu thereof I leave her that whole tract of land adjoining the point, containing upwards of three hundred acres, the lowermost part of said land; the land between the two parcels I left to the said Judith and Barbara I leave to the said Thomas, son of the said Rachel Dupre"—

*7. It was held that the devise to the said Barbara in the codicil was not merely a substitution of one tract of land for another, to be held by her for life only, and subject to the limitations of the original devise to her by the will of the testator, but was a devise in fee. [*473

Before Earle, J., at Barnwell, Fall Term, 1838.

The action upon which this special verdict was predicated, was one to try titles to a tract of land. In order properly to understand the case, an abstract of the will of the testator Galphin is also subjoined.

Special Verdict.

We find that George Galphin, by his last will and testament, dated the

6th day of April, 1776, gave her freedom to a colored woman named Barbara, then his slave; and by a subsequent clause, devised to her certain lands (not then in dispute) for the term of her natural life, with remainder over to such issue as she might leave living at her death, to be divided between and among them in such proportions and under such limitations, restrictions and conditions, as she the said Barbara by will or other paper duly executed, should direct or appoint; and in default of such appointment, then to be equally divided.

By a codicil duly executed 14th February, 1778, the testator revoked that part of the will containing the foregoing devise to Barbara, and in lieu thereof devised to her without limitation during life, and also without words of perpetuity or inheritance, the lands now in dispute, and also without the remainder over to her issue, and without the power of appointment to the said Barbara as to the mode of distribution provided for in the orignal devise.

We find that the said George Galphin departed this life in 1782, leaving the said will and codicil unrevoked. That the said Barbara, who intermarried with one William Holmes, entered upon the lands devised in the codicil, and continued in possession thereof until they were sold as her property under execution, and she was evicted by action at the suit of the purchaser in 1827.

We find that Barbara Holmes departed this life in 1830, leaving the plaintiffs, *the issue of her marriage with William Holmes*, who was also then dead; and that the said Barbara died intestate, and without having executed otherwise the power of appointment in relation to the said land.

*474] *We further find, that the defendant entered and occupied the land since 1830, as the tenant of Darling Peoples, the purchaser at sheriff's sale, who now claims. If the Court shall be of opinion that the plaintiffs are entitled to recover, then we find for the plaintiffs, the lands described in Allen's plat of survey, and marked with seventy dollars damage. If the Court should be of opinion that the plaintiffs are not entitled to recovery, then we find for the defendants. And we refer the Court to the entire will of George Galphin, which was in evidence.

(Signed,) JOHN F. PEYTON, *Foreman.*

ABSTRACT OF GEORGE GALPHIN'S WILL.

The testator first gives freedom, from the time of his death, to all legatees or devisees not then free, and especially to Barbara, daughter of Rose. Then having given freedom to two mulatto girls, and one Indian (daughter of Natechuchy), &c., &c., he leaves in four lengthy clauses, several tracts of land, and also from twelve to twenty slaves, with their children and increase, to Thomas and Martha Galphin, children of Rachel Dupee, and to George and John, sons of Maturney; the lands and slaves being given to each of them under the same restrictions and limitations as in the devise to Barbara. The testator then gives to Judith, daughter of Maturney, one half of three tracts of land, two hundred acres of the ceded lands, with eighteen slaves, their children, &c., under limitations, as in the case of Barbara. He next gives to Barbara, the daughter of Rose, for and during her natural life, without impeachment of waste, the use of the lower half of three tracts of land, which said tracts run from Newman's line down to the point, containing in the whole about thirteen or fourteen hundred acres, with all the improvements thereon, called Silver Bluff. He also leaves her seventeen slaves,

and their children, and future increase, &c. And upon the death of the said Barbara, he gives the said lands and slaves unto the child or children of the said Barbara that shall be then living, in such parts and proportions, and for such estate and estates, and at and under such contingencies, limitations and restrictions, as the said Barbara shall by her last will and testament in writing, or other writing by her duly executed, direct, limit and appoint. And for want of such directions, limitation and appointment, he gives and bequeaths the said *lower half of the said three tracts of land, with the slaves, &c., to and amongst all and [*475 every the children of the said Barbara, that shall live to come of age or have issue, to be equally divided amongst them and their respective heirs and assigns forever, as tenants in common, and not as joint tenants. And if but one child of the said Barbara should live to come of age, or have issue, to that child alone, and to his or her heirs and assigns forever. Then after disposing of two slaves and several minor articles, the testator proceeds thus: "Also, it is my desire that in case any of the six devisees and legatees hereinbefore mentioned, namely, George, Thomas, John, Judith, Martha and Barbara, happen to die without having issue, or their issue die: That then and whenever a contingency of that kind happens to any of the said devisees, or any of their issue, that the estate, slaves, and issue of slaves herein intended for such devisee or devisees, and issue, shall be shared alike equally by my executors, or the survivors of them, amongst the survivors of the said devisees and legatees: and the land to be shared between the said George, Thomas and John: and the slaves and their issue to be shared equally between the said six devisees and their heirs." Having made the said Thomas and Martha residuary devisees and legatees, Galphin next provides, that in case the said six devisees and legatees should all die intestate, and without issue, all the estate given to them should go to his sisters and their heirs, share and share alike. The remaining portions of the will are entirely irrevalent to the matter in dispute.

In the first codicil, the testator revokes that part of his will wherein he bequeaths to Judith and Barbara the three tracts of land between them, and bequeaths to the said Judith the place whereon she now lives, adjoining John Newman's land, containing three hundred acres, under the contingencies, limitations and restrictions mentioned in the said will. Then having revoked several other parts of his will, he goes on to say: "I revoke that part of my said will wherein I leave to the said Barbara that land below Silver Bluff, being a part of three tracts of land. In lieu thereof, I leave to her that whole tract of land adjoining the point, containing upwards of three hundred acres, the lowermost part of said land. The land between the two parcels I leave to the said Thomas, son of the said Rachel Dupee." In the second codicil, he revokes a legacy of one negro to Barbara; and in the third codicil he gives to the said Barbara five slaves *and their [*476 children, and future issue, unto the said Barbara, her heirs and assigns forever.

The will is dated 6th April, 1776. The first codicil, February, 1778. The second codicil, March, 1780; and the third, September, 1780. The will and codicil were sworn to before John Ewing Calhoun, of Ninety-six District, in April, 1782.

Report of the Presiding Judge.

This was a motion for leave to enter Judgment. Several questions arose.

1st. Whether by the same testament which manumitted her, the woman Barbara could take an estate in the land devised in either of the clauses.

2d. If she could, whether she could legally contract marriage so as to enable her children to take as issue under the first clause recited, the remainder limited to them.

3d. Whether under the codicil revoking that part of the will containing the devise of lands limited over to the plaintiffs, Barbara, if she could

take at all, did not take an estate in fee, which passed to the purchaser at sheriff's sale.

On the first question, it seemed to be conceded, that Barbara, at the death of George Galphin, might be legally set free, there being no restriction on the power of manumission. But the doubt was whether, as her freedom was a legacy which could not take effect if there were debts, and might require the assent of the executor, there was at the instant of the death any one in being capable of taking the particular estate so as to carry the remainder. But it seemed not to have struck the counsel that if incapable of taking under the will, the particular estate, she could not under the codicil take the estate in fee which he now claims for her. As the opinion of the Court was formed on another point, it seems to be unnecessary to decide that question; nor, according to the view I have taken of the will, is it necessary to decide the question on the validity of the marriage. I hope it will never become necessary to decide that question against the legitimacy of the plaintiffs.

On the third question, I was of opinion that the codicil is a clear unequivocal revocation of the entire clause containing the devise of the particular estate to Barbara for life, with remainder to her issue. That
*477] the limitations and restrictions in that clause *were not intended to be annexed to the devise in the codicil, and that she took the estate there free from such limitations and restrictions; and although there are no words of perpetuity or inheritance, she took under the codicil an estate in fee, which was liable for her debts, and became vested in the purchaser at sheriff's sale. It was therefore ordered that the Postea be delivered to the defendant, and that he have leave to enter judgment.

The plaintiffs appeal, and move to reverse the decision, and for leave to enter judgment for themselves.

Appeal heard at CHARLESTON, in the Court of Errors, February, 1841.

BELLINGER, FOR THE APPELLANTS.

The grounds taken by the defendant's counsel in the Court below, and the report of the presiding judge, make it necessary for the appellants to maintain the following positions:—

I. That in this State, free persons of color can take and hold an estate in *real property*.

II. That Barbara Holmes (the colored woman from whom plaintiffs are descended), could contract marriage with a *white man*, so as to enable the issue to take under Galphin's will, the estate in remainder limited to them.

III. That Barbara Holmes could be a devisee under the *same* will which gave her freedom, and thus could take the particular estate so as to support the remainder.

IV. That if Barbara Holmes could *not* be a devisee under the same will which gave her freedom, this does not defeat the estate in remainder limited to her issue, the plaintiffs.

V. The lands in dispute were not bequeathed to Barbara Holmes *in fee simple;* but were bequeathed to Barbara Holmes *for life*, with remainder to her issue, the plaintiffs. In support of these positions, he argued as follows:

I. That in this State, free persons of color can take and hold an estate in real property.

1. Because it has been decided again and again on circuit, that such persons can take and hold an estate in *personal* property.

And in one case a bill in chancery for the payment of *an annuity* was supported, the objection being made that the complainant was a free person of color.

2. Because, in *Rees* vs. *Parish*, 1 M'Cord Ch. 58, a free mulatto was admitted without objections as a defendant in chancery, and claiming certain negroes.

*3. Because, in *Singleton* vs. *Bremar*, State Rep. 201, no objection of this kind was taken against a deed of a house and lot to a free woman of color, [*478 though such an objection (if sustainable) would have been fatal.

4. Because, in the *State* vs. *Mary Hays*, 1 Bail., 275, the Court say: "the Acts of the Legislature, the decisions of our Courts, and the constitution of the State, concur in denying to the mulatto any civil rights beyond those incident to the holding and transmission of property"—which, in connexion with the context, can mean nothing less than this: that *no* Act of the Legislature, *no* decision of our Courts, and *no* part of our constitution, prohibited the mulatto from holding and transmitting property, nor from enjoying the rights incident thereto.

5. Because, it being admitted that such persons can take and hold *personal* property, it is incumbent on the defendant's counsel to show that they are *prohibited* from taking and holding *real estate*.

6. Because, so far as arguments *ab inconvenienti* apply, it is *less objectionable* for such persons to take and hold real estate, than to be allowed to possess and accumulate personal property, and yet be debarred from the chief means of procuring settled and permanent residences.

7. Because the state of freedom, *ex vi termini*, puts such persons in possession of all rights and privileges, from which they are expressly excluded. The defendant's counsel must disable the plaintiffs by the strength of his objection.

8. Because free persons of color certainly have rights—they are human beings under our government; yet 1st. they are not free white citizens; 2d. they are not Indians; 3d. they are not slaves; and there is no other status or condition to which they can be assigned, unless they be viewed as a class entitled to all the rights and privileges of free white citizens, saving those (many indeed) from which they are excluded by the provisions of the Constitution, by Legislative enactments or adjudicated cases.

9. Because the Constitution and Legislative enactments have imposed various disabilities on these persons, yet in no part of the Constitution and by no Act of the Legislature are they prohibited from taking and holding real property.

10. Because we cannot suppose all those disabilities and prohibitions to have been needless and supererogatory; they must *have been found necessary; [*479 therefore we cannot go *beyond* those disabilities and prohibitions.

11. Because, in Georgia (a State having similar institutions), express enactments have been found necessary.

An Act 19 Dec., 1818, prohibiting free persons of color from purchasing or acquiring real estate or slaves. Lamar's Digest. p. 815.

This was afterwards repealed, and the prohibition (with some exceptions) removed, as to *real* estate.—A. A. 22d Dec., 1820. Lamar's Digest, p. 820.

12. Because the whole course of legislation on this subject in South Carolina, has been in the *negative* and not in the *affirmative*—enactments of prohibition, and not of grants. Compare the course of legislation as to slaves, and as to free persons of color, especially in relation to criminal matters.

13. Because these persons from the earliest times have been *in fact* allowed to take and hold property (both real and personal) within the knowledge, without the prohibition, and therefore with the implied sanction of the Legislature.

14. Because the Legislature have clearly and unequivocally expressed their sanction. *Vide* Acts of Assembly, each year imposing taxes on such persons, thereby admitting their right to hold property generally.

So various Acts of Assembly, as to punishing such persons by fines.—A. A. 1740, P. L. 170. A. A. 1820, p. 23.—1822, p. 10 and 12.—1823, p. 63.—1833, p. 40.—1834, p. 13 and 15.

Above all, A. A. 1822, p. 10, § 5, imposing a tax on all houses within the limits so guarded (by the Municipal Guard of Charleston), inhabited by negroes or persons of color, as tenants or owners.

15. Because the question has been expressly decided by the Appeal Court in the affirmative: *The Real Estate of Mrs. Hardcastle ads. the Escheator of Pineville*

Academy. (Original manuscript.) Tried before Judge James, May, 1825.(*a*)—Elizabeth Hardcastle, *a free woman of color*, died possessed of several tracts of land, which the Escheator of Pineville Academy claimed as escheator; she having left no person that could claim the same by descent or purchase. The claim of the escheator was resisted by persons who represented themselves as next of kin.

On appeal, determined, that by the common law of the State, the *free* descend-
*480] ants of a negro are entitled to hold lands, and *that where the evidence of relationship between the individuals claiming, and the deceased, is satisfactory, they may *take by descent.*

II. That Barbara Holmes (the colored woman from whom plaintiffs are descended) could contract marriage with a white man, so as to enable the issue to take under Galphin's will, the estate in remainder limited to them.

1. Because if it is lawful for free persons of color to take and hold property (as I have shown), there is removed *one* of the *chief objections* to such marriages.

2. Because, under the civil law, though senators, their sons and grandsons could not marry a manumitted slave, this prohibition was founded on positive law, and did not extend to private men. Vid. Dio. book 16. Adam's Roman Antiq. 442.

3. Because, under the English Common Law, a freeman might marry a neife, or a villein a freewoman—the issue (contrary to the maxim of the civil law) would follow the condition of the father, but the marriage was lawful. 2 Blac. Com. 94. Litt. Sec. 187. "But the spurious issue of a neife, though by a free father, would be a villein, *quia sequitur conditionem matris, quasi vulgo conceptus.*" *Vid.* Bracton, book 1, c. 6, as cited in Hallam, 1st vol. p. 232. (Phia. ed.)

Contra Blackstone and Litt. *ut supra*, as to the status of such spurious issue; but this evidently shows that marriage might exist between such parents.

4. Because the chief objection against such marriages, the want of civil status in the person of color, has never been recognized under our laws, is not consonant with the spirit of our institutions, and certainly has no application in cases where the want of status arises from positive prohibitions of a certain and definite character and extent. Law Journal, p. 92.

5. Because, in Pennsylvania, Massachusetts, Virginia, North Carolina and Illinois, *express statutory provisions* have been found necessary to make such marriages unlawful.

6. Because the marriage of a *white* man with a *free woman of color*, is not more contrary to law, than the marriage of an *Indian* with a *free woman of color*, or a *white man* with *an Indian*, or citizen with alien. 2 Kent, 49. (n.)

7. Because no such objection is recognized at common law. *Vid.* 1 Blac. Com. 433. Kent's Com. part iv. Lec. xxvi.

*481] 8. Because, our A. A. 1712, following the Stat. 32 H. 8, c. 38, *declares "all persons to be lawful (that be not prohibited by God's law) to marry." *Vid.* P. L. 55.

9. Because, if (as I have shown) a state of freedom *ex vi termini*, puts free persons of color in possession of the rights of free white citizens, save those from which they are expressly excluded, then most unquestionably such marriages are lawful, unless the objector can show positive prohibition, which cannot be done.

Hence, I conclude, although such marriages are *revolting*, and justly regarded as *offensive to public decency*, they are not contrary to *existing laws.*

III. That Barbara Holmes could be a devisee under the same will which gave her freedom, and thus could take particular estate so as to support the remainder.

1. It cannot be contended, that the *mode* of manumission was contrary to law. Galphin's will took effect in 1782, eighteen years previous to the A. A. 1800, (2 Faust, 355, 7), prescribing the mode of manumission, and afterwards superseded by A. A. 1820, p. 22, prohibiting emancipation.

2. Nor can it be contended, that there were debts against the estate of Galphin, which could bar the manumission.

3. Nor can it be contended, the executor did not assent to the legacy of freedom. Such assent will be presumed. Toller's Ex'ors. p. 308.

In *Lenoir* vs. *Sylvester*, 1 Bailey's Rep. 639, the Court decided that *under* the A.

(*a*) Harp. L., Riley's Ed., Appendix, 495.

A. 1800 (which required various formal proceedings), the mere assent of the executor to a life estate in slaves, was not an assent to freedom, bequeathed to those slaves on the death of the tenant for life. But in this case, Barbara Holmes was in possession of the lands devised (see the special verdict), and surely *previous* to 1800, if an executor assented that one who had been a slave should hold property under a will, this was an assent to freedom bequeathed by that will, to take effect *eo instanti* the testator died. The substantial objection is, that when the will took effect, Barbara Holmes was *not yet freed*—therefore, being a slave, was incapable of taking the life estate; in other words, it is said the bequest of freedom *took effect*, but not in time. This objection is unsustainable.

1. Because, if no debts existed at the time of Galphin's death to bar the bequest of freedom, then *quoad debts*, the bequest of freedom took effect *eo instanti* the testator died.

2. Because, if the executor did assent, even if there were debts, *they could not, after such assent, affect the bequest of freedom; such assent being *irrevocable* and *being proof of assets*. Toller's Ex'ors. p. 307, 310. State Rep. p. 21. [*482

3. Because it is questionable whether the doctrine as to the executor's assent, applies with equal strictness to a bequest of freedom, as to a pecuniary legacy. A bequest of freedom *ipso facto* makes the legatee free *eo instanti* the will takes effect, *unless* the executor subsequently takes measures of prevention.

4. Because, even if the assent of the executor be essential, the bequest of freedom to Barbara Holmes, *ipso facto*, gave her an inchoate right, which though requiring the executor's assent to complete it, would yet prevent the devise to her from being void. Before assent, a legatee may dispose of his legacy. Toller, 311.

5. Because, assent of the executor, when given, would have relation to the time of the testator's death, and thus would have made Barbara Holmes capable of being a devisee.

Thus, profits accruing between the testator's death and the assent, go to the legatees. *Vid.* Toller's Ex'ors, p. 311. "Such assent, shall by relation, confirm an intermediate grant by the legatee of his legacy." *Ibid.*

6. Because the objection itself furnishes an answer.

If it be law that Barbara Holmes could not take the devise until assent of executor, Galphin must have known this, and in fact, an inspection of the will shows that Galphin meant "when Barbara Holmes shall be made free, by the assent of my executor to the bequest of freedom, then let her take the devise," &c.

See the doctrine in relation to devisees *in ventre sa mere*, and to other cases where the testator shows that he was aware that the devisee could not take immediately. *Vide* Fearne Cont. Rem. 428. Powel's Devises, p. 332.

IV. That if Barbara Holmes could *not* be a devisee under the same will which gave her freedom, this does not defeat the estate in remainder limited to her issue, the plaintiffs.

1. Because in the case of *Fable and others* vs. *executor of Fable*, February, 1838, 2 Hill's Ch. 400, it was settled, that if land be conveyed to a slave, his master would be seized of that land; not for himself, but only until office found for the State; and that a bequest to slaves is not void.

Under the authority of this case, even though Barbara Holmes could not take in her own right the life estate devised to her, the estate in remainder would not be defeated.

*2. More particularly, because in the said case of *Fable and Fable*, conveyances, devises, &c., to slaves, (*quoad being void,*) are put on the same footing as conveyances, devises, &c., to aliens. [*483

Now an alien can be a devisee, and can take and hold until office found. Vide Powel's Devises, p. 316.

Also, if an alien holding a particular estate may, by fine, &c., defeat the remainder, (Vide Powel, p. 318; 2 Kent, 61,) surely he can preserve it.

3. Because the case of the *Escheator* vs. *Real Estate of Hester Smith*, 4 McCord, 452 and 455, taken in connection with the above case of *Fable and Fable*, fully supports me in saying that no more than Barbara's life estate could have been escheated, because it was all the interest she had in the land; and however *her* interest might have been affected by the laws of escheat, *it* had passed away;

and the estate had become legally vested, according to the limitations of the will, in her issue, the plaintiffs, who labored under *no disabilities*.

4. Because, if the life estate was void, as being devised to one incapable of taking, be it remembered that this was an *executory devise*, and therefore required no particular estate. Vide 2 Blac. Com. 173; 4 Kent, 236.

V. That the lands in dispute were not bequeathed to Barbara Holmes *in fee simple;* but were bequeathed to Barbara Holmes for life, with remainder to her issue, the plaintiffs.

1. This is the debateable ground; for if free persons of color *cannot* hold real estate, and if Barbara Holmes could not take *a life estate* under the same will which gave her freedom, the defendant will not forget that he claims the land in right of Barbara Holmes, as devisee in fee simple under Galphin's will.

2. The grand rule of construction—"Devises are to be so construed as if possible to effectuate the entire intention of the testator, if that intention is not opposed to the policy of the law against perpetuities, and to this all other rules of construction are subordinate." *Bedon* vs. *Bedon*, 2d Bailey, 231.

3. The codicil (the first) devising the lands in dispute, contains no words of perpetuity or inheritance, nor any words indicating an intention to pass a fee. Without waiving the argument that the A. A. 1824, p. 23, cannot affect a will which went into operation in 1782, I undertake to show under the A. A. 1824, that no construction is "consistent with the will of the testator *expressed and implied," but this: That the lands devised in the codicil are subject to the limitations and restrictions mentioned in the body of the will—that the codicil changed the subject matter, but not the terms of the devise.

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1. Because Galphin expressly devised a life estate, and not a fee simple, the *words* which he used at that time conveying no other meaning. The A. A. 1824 *might* change the law, but it could not reach *backwards* through a vista of *forty years*, and make Galphin mean the *contrary* of what he meant and said.

2. Because an examination of the *whole will* and the codicils shows that Galphin meant to settle his property on the six devisees, (including Barbara Holmes,) with limitations and remainders in favor of each other. This is expressed in the will, and there is nothing to contradict it in the codicils.

3. Because a comparison of the words and expressions used in the will, with the words and expressions used in the codicil, shows that by the codicil the testator meant merely to *change* the *subject matter* of the devise—to put one tract of land for another.

4. Because, on inspecting the codicil, we find that the testator, having in the will divided certain tracts of land between *two* of the said (6) six devisees, meant in the codicil merely to divide those same tracts among *three* of the said six devisees.

5. Because the limitations and remainders mentioned in the will are obviously not affected by the codicil as to *five* of the devisees. Therefore, if the defendant's construction be correct, it will follow that Barbara Holmes not only took a fee simple in the land devised to her, but might have taken *as survivor to each and all* of the said five devisees, *none* of whom could have taken as survivor to her. In other words, if the testator meant that Barbara Holmes should take a fee simple under the codicil, instead of a life estate as in the will, he surely would have altered the clause of survivorship *as to her*.

6. Because, in the third codicil, which does give Barbara certain property *absolutely*, the words are, "to the said Barbara, *her heirs and assigns for ever*."

7. Because, throughout the will and codicil, the *most minute and particular attention* is paid to words and phrases. Evidently it was drawn by an *expert*. Evidently if a fee simple had been intended in the codicil, *appropriate words* would have been used.

*8. Because, throughout the will and codicils, there are not less than twenty-five places in which words of devise and bequest are used; and wherever the testator obviously meant a fee simple, we find him using words of perpetuity or inheritance; where not a fee, *those words are wanting*.

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9. Because the very words of the codicil are *conclusive*. The testator does *not* say, "I revoke that part of my will wherein I leave to the said Barbara a life-estate in the land below Silver Bluff, and bequeath the land adjoining the point

to the said Barbara, *her heirs and assigns for ever.*" But he says, "I revoke that part of my said will wherein I *leave* to the said Barbara *that land below Silver Bluff*, and *in lieu thereof I leave* her that whole tract adjoining the point." He uses the same expression when *referring* to the devise in the will, as when *passing* the devise in the codicil—"Wherein I leave," and "I leave;" also, "in lieu thereof"—as though he had said, "In lieu of the land below Silver Bluff, let Barbara take the land adjoining the point." If so, the land adjoining the point (which is the land in dispute) would be subject to the same limitations as the land originally devised.

Such being the *intention* of the testator, that intention must prevail, and judgment be entered up for the plaintiffs.

Mr. Patterson, contra. 1. Barbara was a slave at the time of the death of testator, could not take by devise, and the estate passed to the residuary legatee, or to the heir at law. 1 Bail. 642, *Lenoir* vs. *Sylvester*. She was clearly a slave. Could she take by descent or purchase? Certainly not. For same reason she could not by devise. Coop. Just. 411; 4 Eq. Rep. 266, *Bynum* vs. *Bostwick*.

Shep. Touch. 414. If a devisee be incapable of taking at the time, the devise fails. 1 P. Wms. 500; 2 Pow. Dev. 243.

Assent of executor to devise nugatory, for the estate must pass immediately to devisee, and he must be capable of taking *eo instanti*. 1 Blac. Com. 372. Thus the proposition is made out that Barbara could not take.

2. As to construction of the will. If Barbara took the land under the codicil, she took it free from the limitations of the will. 2 Vern. 625. She takes under the former only half the quantity devised in the latter, besides that the words "the whole" are *used in the codicil. If he did not suppose he was revoking the limitations by the codicil, why should he reannex them [*486 to the devise to Judith? Co. Lit. 210, a rule of construction of wills.

Jac. L. D. Marriage, 2 Kent's Com. 215, N. A.

In the will these limitations apply to the negroes as well as the lands. Yet in the third codicil, the bequest of the negroes, there to Barbara, is expressly absolute and in fee. *Dunlap* vs. *Crawford*, 2 McC. Ch. Rep. 171.

Curia, per EARLE, J. Whatever may be said about public policy, and whatever may be the future consequences, it is now a settled point, that a free person of color, by the laws of this State may take and hold, convey by deed, dispose of by will, or transmit to his heir at law, both real and personal estate. Barbara Holmes, the ancestor of the plaintiffs, and under whom the defendant claims, was a slave at the time of the devise in question. The plaintiffs who bring this action to recover the land must show a perfect title in themselves. In order to do this, they must show, 1, that Barbara, although a slave of the testator at his death, could take, and did take, under the will; or 2, that the remainder to the plaintiffs is good, by way of executory devise, although the devise of the life estate to Barbara, may be void as to one incapable of taking; 3, that her marriage with Holmes was a lawful and valid marriage, which rendered the issue legitimate, and capable of taking the remainder limited to them; 4, that the codicil is not a revocation of the will, so far as regards the remainder to the plaintiffs, but that under it Barbara took only a life estate, subject to the same limitations and conditions which are annexed to the devise in the will itself.

Several of these propositions involve points that are not free from difficulty, and on which there might be some diversity of opinion, but as the judgment of the majority of the Court has been formed from a construction of the codicil alone, it has been deemed unnecessary to consider any of the other questions raised by the plaintiff's case, or to express any opinion upon them. If in fact the will, as far as regards the remainder

to the plaintiffs, is revoked by the codicil, then it is needless to inquire whether Barbara could take her freedom and the devise by the same instrument; or whether the remainder must take effect by way of executory devise; or to consider the validity of the defendant's marriage with Holmes. The civil status of a person circumstanced *as Barbara *487] was, especially in regard to her capacity to take and hold property, is not easy to define.(a) A slave may acquire property, but as he cannot hold, it inures to the benefit of the owner. At the date of this will there was no restraint on the power of manumission, and Barbara was lawfully made free, exempted from the control, and placed beyond the reach of the heir at law. Freedom, when bestowed upon a slave by will, is usually spoken of as a legacy, which requires the assent of the executor as other bequests. The analogy is not perfect, and I am not sure that some confusion of ideas is not created by the use of the same terms, in reference to subjects which seem to be of different natures. If property be given to a slave the master may seize it presently. But freedom bequeathed to a slave of the testator, is not only inconsistent with any claim of property in the heir at law, but a solemn declaration that he shall not seize or hold him as property. Should the executor withhold his assent to the legacy of freedom to the slave, could the heir at law retain him in slavery? But in this case the testator died in 1782, and Barbara immediately went into the enjoyment of her freedom, and into possession of the land, and so remained until her death in 1830. The assent of the executor may be necessary to the enjoyment of the legacy in possession, but not so to enable it to vest, which I apprehend it did at the instant of the death, subject only to the claim of creditors, and the power of the executor to make her liable for debts. Without this, if a slave can take at all, subject to the right of escheat, or to the superior claim of the master, then the devise also vested in Barbara, and as soon as from lapse of time the assent of the executor to the legacy of freedom might be presumed, and the claims of creditors to be satisfied or barred then her title became absolute and perfect.(b) If twenty years were necessary for this purpose, she had, after the expiration of that term, twenty-eight years of quiet and undisturbed possession of the land, which would be sufficient to give her a title, as a free person of color, against the heir at law, and all the world, unless the plaintiffs are entitled to the remainder they claim, after the determination of what they allege to have been her life estate.

In coming to a conclusion upon the construction of the codicil, we should have no difficulty if we were to confine our attention to the words of the devise. It is a gift of land to Barbara, without words of per- *488] petuity or of limitation. The Act of 1824 *has furnished the rule of interpretation for such a devise.(c) "Every gift of land by devise shall be considered as a gift in fee simple, unless such construction be inconsistent with the will of the testator, expressed or implied." The word "hereafter," in the first part of the section, is held to relate to the time of adjudication, in connection with the word "considered," and not to the date of the devise. And therefore wills executed

(a) Supra, 471. *An.*
(b) See *Vinyard* vs. *Passalugue*, 2 Strob. 536. *An.*
(c) 6 Stat. 238, § 7. *An.*

before, as well as since the Act, have been construed according to its provisions. *Hall et al.* vs. *Goodwyn et al.*, 4 McCord 442; *Dunlap* vs. *Crawford*, 2 M'C. Ch. R. 171. The ground of the argument for the plaintiffs is, that such construction is inconsistent with the will of the testator, as implied from the context of the instrument, and the views which have been urged upon the court to sustain that ground are ingenious and plausible. Admitting the rule to be that the intention of the testator is the object of inquiry, and when ascertained is to govern in the construction, yet when the words used are plain and unambiguous, and have a certain and definite legal import, it is not enough for the plaintiff to make out a case that is plausible or probable. The intention to give the words a different and more limited meaning, must be made clear and manifest. A majority of the court thinks that this has not been done. Without minutely reviewing all the grounds of argument which have been taken for the plaintiffs, I will briefly present the reasons for supposing that the legal interpretation of the words is supported by the apparent intention of the testator; and in doing so, I shall notice incidentally some of the arguments of the plaintiff's counsel.

In the will, the testator devises in consecutive clauses, first to Judith, then to Barbara, each one half of certain lands containing thirteen or fourteen hundred acres, to themselves for life, with the power of disposing, and in default, with remainder over. The language of the two clauses is identical, except the names of the devisees and the description of the lands. In the codicil the testator uses the following language. "I do hereby revoke that part of my will wherein I bequeathed to the within named Judith and Barbara the three tracts of land between them." Had the testator stopped here, and made no further devise in favor of either, can there be a doubt that the original devise, both life estate and remainder would have been gone? But the testator proceeds in the next paragraph as follows: "I bequeath to the said Judith the place whereon she now lives, adjoining John Newman's land, *containing three hundred acres, *under the contingencies, limitations and restrictions* [*489 *mentioned in my said will.*" Had he afterwards made no provision for Barbara, it is equally clear that the claim of the plaintiffs, to the remainder under the original devise, would have been extinguished along with the life estate of their mother. The whole of the two clauses in favor of Judith and Barbara, were expressly revoked; and the whole subject matter was stricken out of the will. The testator then inserts seven new clauses in the codicil, in four of them revoking so many clauses of the former will, and in the others bequeathing three new legacies. He then proceeds as follows: "I revoke that part of my said will wherein I leave to the said Barbara that land below Silver Bluff, being a part of three tracts of land, and in lieu thereof, *I leave* her that whole tract adjoining the point, containing upwards of three hundred acres, the lowermost part of the said land. The land between the two parcels I left to the said Judith and Barbara, I leave to the said Thomas, son of the said Rachel Dupee." Inasmuch as the testator, throughout the will, when he meant a life estate, had used the appropriate words of limitation, and in like manner when he meant an estate in fee had used words of perpetuity, it is argued that the devise to Barbara in the codicil by the words, "I leave her that whole tract," is to be regarded as a mere substitution of

one portion for another, to be held for life only, and subject to the limitations of the original devise; and that this is plainly implied from the context. As he used words then deemed appropriate to convey a life estate, it is supposed he meant no more. But although words of inheritance previous to 1824, in one of our courts of appeal, were held necessary to create a fee, in the other they were not. And the settled law now is that words of inheritance were not necessary for that purpose, even in 1778; but that the words of the codicil, without more, created a fee. The other ground of implying the intention that the devise in the codicil should be for life and subject to the limitations of the will, would have great force, were it not met by an argument on the other side equally apparent on the face of the will, by which it is neutralized, if not destroyed. As I have shown, by the first clause of the codicil, the clauses in the will containing the original devises to Judith and Barbara were entirely revoked in words at least; when the testator proceeded to devise *490] other lands to Judith, to be held on the same *terms and limitation, he considered it necessary to annex words plainly and unequivocally expressing that intention, "under contingencies, limitations and restrictions mentioned in my said will." If the subsequent devise to Barbara had followed in immediate juxtaposition, the argument for the plaintiffs would have been strengthened. But after introducing many clauses on different subjects, he gives her in lieu of the land devised to her in the will, "that whole tract," &c., without more. If the words of restriction had not been annexed to the devise to Judith in the codicil, she would have taken a fee simple. Because the testator intended that she should not take a fee simple, but only a life estate, he annexed them. If he intended that Barbara should take no more, it was equally necessary to annex the words subjecting her devise to the former limitations. And it is a strange argument to say, that because he omitted the words, he intended to annex the meaning. So likewise of the devise to Thomas, son of Rachel Dupee, of the land between the two parcels, the words plainly import a fee. Are they, too, to be construed as creating not only a life estate, but as subjecting it to the limitations of the original will? And if so, what limitations? It is more rational to conclude, as the testator seems to have known very well what he was about, and to have understood what words were necessary to convey his meaning, that if he had intended the last devise to Barbara to be for life only, and to subject it to the limitations of the former devise, he would have expressed his intention in unequivocal language. If his object was merely to make an additional provision for Thomas, this would have been easily accomplished by devising him the intermediate tract, without further altering the clause as to the others. It is supposed that the argument for the plaintiffs is much strengthened by this consideration, that the remainders in the will are not affected by the codicil, as to five of the devisees, as to each of whom Barbara might have taken as survivor, although neither could have taken as survivor to her. Besides the land described in the clause of revocation, Barbara, as well as each of the other children, had a devise of certain ceded lands in Georgia. But by the same codicil all these devises of ceded lands are revoked; and the testator bequeaths to each in lieu thereof a legacy of fifty pounds sterling. If, then, the other devise to Barbara was wholly revoked by the codicil, she took no land under the will. And it may well be questioned

whether *her right of survivorship in regard to the lands, was not gone. But the answer to this suggestion may be found in the [*491 fact, that by a subsequent codicil the testator bequeaths to Barbara, her heirs and assigns, five slaves and their issue, in addition to her former legacy under the will. In these the other legatees had no interest as survivors, although her own right in regard to their legacies remained unimpaired. We cannot therefore undertake to say that the testator, on reconsideration, may not have intended in favor of Barbara a more beneficial provision than was made at first. In regard to the negroes he has certainly so intended; and in regard to the lands, as he used words legally importing that intention, we have no sufficient evidence from the context, either in regard to language, arrangement or circumstances, to satisfy us that his intention was otherwise. We are therefore of opinion, that the codicil was an entire revocation of the original devise, under which the plaintiffs claim the remainder; that the limitations in favor of the plaintiffs do not attach to the devise in favor of Barbara in the codicil; and that they cannot recover in this action, whatever may be the estate of Barbara, or howsoever acquired; whether she took under the codicil an estate for life or in fee, or as a free colored person has acquired title by possession. The motion is refused, and the judgment of the Circuit is affirmed.

GANTT, RICHARDSON and EVANS, JJ., and JOHNSTON and DUNKIN, Chancellors, concurred.

BUTLER, J., having been of counsel in the cause gave no opinion.

[The opinion of Chancellor HARPER was, by some means, lost or mislaid, so that a copy could not be furnished the reporter, to present with the report of this case. The annexed summary, however, of his opinion, dissenting from a majority of the Court, has been very kindly furnished the reporter by his Honor, Judge O'NEALL, and will present the points maintained by the Chancellor. REPORTER.]

HARPER, Ch., maintained, 1st, that a slave could acquire and hold real and personal property.

2d. That the slave could both take freedom and property, by the same instrument, a will.

3d. That marriage was merely a civil contract, and that, *there- [*492 fore, it was good and legal between a white person and a free negro.

4th. That the descendants of a free negro, born in lawful wedlock, might take as devisees, under the description of issue, or as heirs.

5th. That the limitation in the will extended to the codicil, and was good, and under it the plaintiffs were entitled to recover.

O'NEALL, J. I agree with Chancellor Harper in all the conclusions to which he has come; and generally in the reasons which has led him to them. But on the first question made, I do not agree to his reasoning in all respects. That a slave is to be regarded as on the footing of an alien enemy, is not in my judgment correct. Slavery in England, and in many other countries, originated out of that hard condition being imposed on captives taken in war. But civilization long since wiped off this stain

on contests between nation and nation. The captive now is no where, except among savages, regarded as a slave. In this State, the only slaves from captivity were the few Indians who in the early settlement were thus treated. The great body of slaves are those who have been acquired by purchase. So far as human beings can be considered as goods and chattels, they have been and must continue to be so regarded.

That that is their legal position is not questioned, but it is supposed that they must have the consideration of men laboring under temporary legal disabilities, in order to keep up the harmony of the law. That there is a great deal of truth in this general position, I freely concede. But I do not think that they can be regarded as laboring under the disability of an alien enemy. For, remove the disability, and what must be the legal result? they then stand as all other men possessed of their political, as well as civil rights. To emancipate would be to naturalize a slave, if he is legally to be regarded as an alien enemy. This never can be the result in South Carolina. The negro or his descendant is not, cannot be, a citizen. The true notion seems to me to be that the negro slave is to be regarded as a being of an inferior caste, not having, and never to have, any political status; but capable of acquiring and holding property by the consent of his master. Every acquisition thus made, is for the master's benefit. For if it either feeds or clothes him, it so far relieves the master from expense on his account. But when we refer to the Act of 1744,

*493] *and every Act for the regulation and government of slaves passed since, we find that it was no novelty to the legislators of this State that slaves should own property.

For the present, this general statement of my views on this portion of the subject will be sufficient. Consistently with them, I think that the consent of the master to the possession of property by his slave Barbara until she became free, is sufficiently manifested by his will. There would, however, be much difficulty in saying that she could thus acquire real estate. But my mind is relieved from all difficulty by two considerations. 1st. I hold that her freedom and estate both took effect at the same instant, the death of the testator. For the assent of the executor to the freedom of Barbara, made her free at and from his death. 2d. On looking to the will it will be seen that the executors are made "guardians" of the real and personal estate devised. This constituted them trustees to take and to hold, until all disabilities (if any existed) were removed.

See Supra, 472. Also, as to the legal capacity of a free negro, *Escheator* vs. *Estate of Hardcastle*, Harp. L. 495, Appendix. *An.*

APPENDIX TO VOL. II.

Zach. Allen *vs.* Noel Johnson.

1. There is a material difference between proving a deed as a part of a chain of title, and introducing a paper as color of title to show the extent of a party's possession. In the first case it must not only be proved to have been in existence before the party acquires rights under it, but when it purports to be less than thirty years old, its execution must be strictly proved.
2. To admit a deed in evidence as an ancient deed, continuous possession under it for thirty years is not always necessary. A less period than this will suffice, if there has been no inconsistent possession to conflict with it. A deed being found in an office, recorded, may be sufficient evidence sometimes; and at all times such testimony may be received to show the antiquity of such a paper.
3. When a party indicates the boundaries of his land by stakes, for more than ten years, by which he shows the extent of his possession, and the boundary thus indicated is made known to the adverse party, who is interested to deny it, and they acquiesce therein, it is a good title to the land by possession, with a color of title.

Before Evans, J., at Chesterfield, Fall Term, 1836.

The facts of this case appear from the circuit report, which is as follows:

This was an action of trespass to try title. The facts of the case, so far as is necessary to understand and decide the grounds made in the notice, were these. The plaintiff claimed the land under a grant to one Pittman, which, located according to its boundaries, cornered the *locus in quo*. Pittman conveyed to Harrell in 1819; Harrell to Mrs. Cook in the same year, from whom the plaintiff derives his title. The subject in controversy was in part a triangular piece of land containing forty acres. The defendant claimed it under a deed from James Killgore to himself, dated in 1808, in which it is described as a part of a tract of land granted to Francis Young for two hundred acres, in 1749. Only one corner of this Young tract was found; in locating from which by course and distance, there being no other way of closing the lines, the land in dispute was not included. The deed from Killgore *to defendant included the whole of the land in dispute; but as the [*496 Young grant could not be located so as to cover the disputed land, the defendant could only avail himself of it to make out a title by possession. To enable him to do this it was necessary to prove the deed, and possession under it. The deed was dated in 1808. On the back was a probate by one of the witnesses before a justice of the peace, in 1811; but the deed had not been recorded. The grantor, Killgore, made the initials of his name for a mark, and a witness who had often seen him sign his name in this way, swore he believed it to be genuine. The witnesses wrote bad hands, indicating they were illiterate. One was dead, and the other had removed many years from the State. Full twenty years ago

the defendant cleared a part of this land, and had been in possession ever since. The field which he claimed contained eight or ten acres, but only a part of it (the witness says one-third) was of the disputed land. Two witnesses proved that seventeen years ago, which was soon after Mrs. Cook bought the Pittman land, Johnson, the defendant, put up a line of stakes from corner to corner on the land conveyed to him by Killgore. These stakes were seen by four of the witnesses, and one of them proved that after the stakes were put up, Johnson sent for Mrs. Cook, and told her the stakes were the line between them, and if she trespassed beyond it he would sue. She never set up any claim to the land beyond the stakes, and frequently cautioned those who worked for her, not to go on Johnson's land. I admitted Killgore's deed to go to the jury, as an ancient paper. I thought its antiquity sufficiently established. It was proved before a justice of the peace, in 1811, and the justice was the same Harrell who conveyed the land to Mrs. Cook. He has been gone from the country fifteen or sixteen years. The proof of Harrell's signature to the probate was not very full, but I thought sufficient to go to the jury. The possession under the deed was twenty-one years, of a part, and the assertion of title to the whole by setting up the stakes, seventeen years. The presumption of a grant is now, I think, clearly established at twenty years, and as a necessary consequence of this, the execution of a deed could be presumed also. 1 Hill, 222; 2 Hill, 493, 592.

In submitting this case to the jury, I told them that according to the view which I took of the Young grant, it could not be located so as to cover the disputed land, and as a consequence the plaintiff was entitled to recover, unless the defendant was protected* by the Statute of Limitations. *497] On this subject I told the jury that possession of a part of the land adversely to the claims of others, gave a good title, after ten years, to the extent of the tenant's claim. The evidence of this claim was what was usually called color of title. It might be in writing, as a grant, a deed, a contract to purchase, or bond to make titles which so described the land as to render it susceptible of identity, or it might be in parol, as proof that he had marked out the boundaries of his land by clear and defined lines, so as to indicate to the owner the extent of what he claimed. There is no question that the defendant has been in possession of a part of the land for a much greater period than the statute of limitations required, and if the deed from Killgore to Johnson was a genuine deed, it was such color of title as would give the defendant the whole forty acres. But independently of this deed, if the defendant marked out his lines by running a line of stakes from corner to corner, and more especially if he gave Mrs. Cook, the then owner of plaintiff's land, notice of the extent of his claim, that this was color of title, and would give him a right to the whole disputed land.

The jury found for the defendant.

Plaintiff appeals. 1. Because his Honor erred in charging the jury, that the possession by defendant of a small portion of the land over the Pittman line, was a sufficient possesssion to give him a title by the Statute of Limitations to the forty acres, included in the deed from Killgore to defendant, inasmuch as the deed was not located.

2. Because his Honor erred in charging the jury, that even if they considered the deed from Killgore to defendant spurious, yet if they believed that the

defendant put up the line of stakes from the pine corner in the new ground to the pine stump in the old field, his possession of a piece of the old field below the new ground for ten years, gave him a title under the Statute of Limitations, up to the stakes.

3. Because the Court charged, that the stakes was a sufficient indication of the extent of defendant's claim; that if defendant had in his possession any part of the land within the stakes for ten years, he would have a statutory title to the stakes.

4. Because the Court erred in permitting the defendant to give in evidence the deed from Killgore to defendant for forty acres, as *an ancient deed, [*498 without proof of its execution, or possession under it.

Curia, per BUTLER, J. There is a material difference between proving a deed as a part of a chain of title, and introducing a paper as color of title to show the extent of a party's possession. In the first case, it must not only be proved to have been in existence before the party acquires rights under it, but when it purports to be less than thirty years old, its existence must be strictly proved. The deed from Killgore to defendant does not purport to be thirty years old; and its execution was not otherwise sufficiently proved; and if it had been offered as a part of defendant's chain of title, he not having had sufficient possession to give him title to any part of the land, it was not legally proved. To admit a deed in evidence as an ancient deed, continuous possession under it for thirty years is not always necessary. The primary object is to show that the deed has had an existence for thirty years. To do this, possession under it for the whole length of time is the best evidence; but a possession of a shorter period of time might suffice, if there has been no inconsistent possession to conflict with it. A deed being found in an office, recorded, may be sufficient evidence, sometimes: and at all times such testimony may be received to show the antiquity of a paper. These principles are discussed and explained in the case of *Robertson* vs. *Craig and wife*, 1 Hill, 389. Chancellor HARPER does not lay down the law in that case, as contended, that there must be a continuous possession under a deed for thirty years, to admit it in evidence as an ancient deed. Upon an examination of his opinion, he rather comes to a different conclusion. But that which purports to be a deed from Killgore to defendant was properly admitted by the presiding Judge, as a paper to show the extent of defendant's possession; and the only question was, was that deed in existence before the defendant went into possession of his land? For it is admitted that it covers the land, and it was clearly proved that defendant's possession was more than ten years. I think it quite clear that the deed was in existence at the time defendant took possession, and it seems equally clear that he took possession and held under it; at least, this is a fact which has been established by the verdict of the jury. But on another ground there was color of title. The defendant had indicated for more than ten years the extent of his *possession by putting [*499 up stakes. The boundary thus indicated was made known to Mrs Cook who was interested to deny it and she acquiesced in it.

The motion for a new trial is refused.

EVANS, EARLE, GANTT and RICHARDSON, JJ., concurred.

Clinton and *Hanna*, for the motion. *Graham*, contra.

As to evidence of ancient deeds, see 1 Rich. 53; Chev. 82; 1 Bay. 364; Rice, 106; 2 N. & McC. 406, 55; 1 Sp. 191. *Am.*

CORNELIA M. DE MILLEN, PER PRO. AMI, *vs.* JAMES MCALLILEY.

Where a deed of gift from a parent to his daughter (the plaintiff) of a negro, contained, among other things, after appointing trustees, the following provisoes, "Provided always, and these presents are upon this special trust and confidence, and upon this express condition, that the said trustees, their executors, or administrators, shall and do permit and suffer me, the said G. De M., to use, keep and enjoy the profits of the said negro Ben, during my natural life, without paying or yielding any for the same or in any respect thereof. Provided also, that if I should remove the said negro Ben out of my possession, or the said negro should be removed out of my possession by any means whatsoever, then the use reserved shall terminate, and the said trustees, or either of them, shall take the negro Ben into their possession, and apply the profits arising from him to the use of my said daughter, until she arrives at the age of twenty-one years, or marries; at which time the said negro Ben to be delivered up to her, her heirs, executors, administrators, or assigns"

It was *held*, 1. That the true construction of the deed was, that it was a conveyance to trustees for the use of G. De M. for life, with a condition forfeiting his estate if he should part with the possession of the slave, or any one should take him out of his possession; and in such case the profits were to be applied to the use and benefit of plaintiff, until her marriage or full age; and if G. De M. should retain possession until his death, then the possession to be delivered to plaintiff.

2. That G. De Millen had a life-estate in said negro, which might be the subject of sale under execution.

3. That the reservation of the use of the chattel to the grantor for life made the whole deed fraudulent and void against creditors.

Before O'NEALL, J. at Chester, Fall Term, 1836, whose report of the case is as follow:

This was an action of trover for the recovery of the value of a negro man named Ben, sold by the sheriff of Chester, as the *property of the plaintiff's father, George De Millen, and purchased by the defendant. The case, it seemed to me, depended upon the construction of the deed from De Millen, conveying the negro for the use of his daughter. That deed is as follows: "South Carolina, Chester District. Know all men by these presents, that I, George De Millen, of the State and district aforesaid, in consideration of one dollar, and the natural love and affection which I have and bear to my daughter Cornelia Margaret De Millen, and for and towards the better support and maintenance of her hereafter, and for divers other good causes me thereunto moving, have given, granted, confirmed and sold, and by these presents do give, grant, sell and confirm, unto the said Cornelia Margaret De Millen, and to her heirs forever, a negro man slave, named Ben, about thirty-one years of age; to have and to hold the said negro Ben, hereby given, granted, sold and confirmed, to her and to her executors, administrators or assigns, as hers and her own proper goods and chattels, from henceforth forever; and I do hereby nominate, constitute and appoint Peter Goza and Mark Goza, trustees for the better carrying into effect the intention of this gift: Provided always, and these presents are upon this special trust and confidence, and upon this express condition, *that the said trustees, their executors or administrators, shall and do permit and suffer me, the said George De Millen, to use, keep and enjoy the profits of the said negro Ben during my natural life, without paying or yielding any for*

*500]

the same, or in any respect thereof. Provided always, also, that if I should remove the said negro Ben out of my possession, or the said negro should be removed out of my possession by any means whatsoever, then the use reserved shall be terminated, and the said trustees, or either, shall take the negro Ben into their possession and apply the profits arising from him to the use of my said daughter, until she arrives at the age of twenty-one years, or marries, at which time the said negro Ben to be delivered up to her, her heirs, executors, administrators or assigns." After hearing the whole case, my opinion was demanded upon the deed, whether the plaintiff could recover? And my opinion being against her upon it, a nonsuit was submitted to with leave to set it aside. It seemed to me that the true construction of the deed was, that it was a conveyance to trustees, for the use of George De Millen for life, with a condition forfeiting his estate if he should part with the possession of the slave, or any one should take him out of his *possession, and in such a case to apply the profits of the labor of the slave for the use of the plaintiff, until marriage or full age, at [*501 which time the negro was to be delivered to her; and if De Millen should retain possession during life, then at his death possession was to be delivered to the plaintiff. To say nothing about the manifest legal result of the title to the possession being in the trustees, and not in the plaintiff, I thought, 1st, that De Millen had a life estate which was liable to execution, and which was properly sold by the sheriff; for the proviso defeating that estate is a plain fraud on creditors. 2d, that the reservation of the use in the chattel to the grantor for life, made the whole deed fraudulent and void against creditors.

The plaintiff appeals, and moves to set aside the nonsuit, on the annexed grounds:

1. Because the deed under which the plaintiff claimed, was a good and valid deed in law, and the legal estate in the negro vested in the plaintiff, so soon as the deed was executed, and the mere use of the slave reserved to the donor, did not vitiate the deed.

2. Because, so soon as George De Millen was deprived of the possession of the negro, the use reserved terminated, and the title of the plaintiff became perfect.

3. Because, from the proof offered, the Court should have sent the case to the jury.

Curia, per GANTT, J. The report of the presiding judge in this case is so full and explicit, and his reasoning so satisfactory on the law giving construction to the deed, under which the plaintiff rests her claim, that it is deemed unnecessary to add any thing further in support of the views taken by him. It is therefore adopted as the opinion of the Court, and the nonsuit as ordered cannot be set aside.

The motion is therefore refused.

RICHARDSON, BUTLER, EARLE and EVANS, JJ., concurred.

T. and *M. Williams*, for the motion. *Gregg* and *McAlilley*, contra.

See Supra, 281; 2 Sp. Eq. 589. *An.*

*502] *The State vs. James Ferguson.

Where the prisoner found a sum of money on the highway, which he soon after converted to his own use, with various circumstances of fraud and concealment, it was *Held*, "that if the prisoner, at the time of finding the pocket-book, and before he removed the money, knew it to be the property of the prosecutor," the conversion under these circumstances would be larceny.

Tried before Earle, J., at Chester, Fall Term, 1837, who reports the the facts as follows:

The prosecutor, James W. Key, on the 1st of Dec, 1836, lost, on the highway leading by the prisoner's house, his pocket-book, containing about six hundred dollars in bank bills. Searching for it the next day, he met the prisoner, and informed him he had lost his pocket-book with some little money in it. On the first Monday of December, a few days after the loss, it was ascertained that the prisoner had a large sum of money, and being searched, it was found he had, including the amount passed off during the day, three hundred and thirty-two dollars, which was given up. Of that amount a fifty dollar and a ten dollar bill were positively identified by the prosecutor, as part of the money he had lost. Before the Justice, on his examination, which was regularly reduced to writing, the prisoner said that the Friday before, he went out into the road near his house, and found a sum of money, rolled up in brown paper, and tied with a string; that he did not know how much there was; that he had kept it until that day; that he had spent a considerable part to different persons in the village, and that was the balance which was found on him. When the money was first found on him, and claimed as Key's, prisoner said, "No, it is money I have been laying up for years." When asked if he had not passed a fifty dollar bill to McKee, he replied, no, I have not. Being taken to McKee's the bill was delivered up which he had passed, and which the prosecutor identified as one of his. On the way to McKee's the prisoner took Key on one side, and said, I want to make it up with you. Key said, I want my money. Prisoner asked, how much do you lack? and added, he did not like to be carried into the store before all the people. The inducement which was supposed to make any statement of the prisoner inadmissible, was this; after they left McKee's store, and before he was carried to the Justice's, John A. Bradley said to the prisoner, it was his opinion that Key
*503] would show him all the *indulgence in his power, if he would come out, and say where the rest of the money was. What the prisoner said to Mr. Bradley then, was excluded. But I did not consider so slight a circumstance enough to exclude his statement before the Justice, on his examination officially taken, that he had found the money. He did not disclose where the balance was. The prisoner's house is the only one between the residence of the prosecutor, Key, and that of his father, where he went the evening he lost the pocket-book, and where he missed it. The name of the prosecutor was written in the pocket-book. There was no room to doubt that the prisoner found the prosecutor's money, and the only defence seriously urged was that larceny could not be committed of money found on the highway. If I had charged the jury as stated in the 3d ground, that they must find a fact which was

physically impossible, else they must acquit the prisoner, it would have been morally impossible for them to find him guilty. I instructed the jury, if the prisoner, at the time of finding the pocket-book, and before he removed the money, *i. e.* before he himself removed, carrying it with him, knew it to be the property of the prosecutor; or not knowing it to be the property of the prosecutor, if at the time of removing the money he did it with the intention to convert it to his own use, it was larceny.

The jury found the prisoner guilty.

GROUNDS OF APPEAL.

In arrest of judgment:

Because the indictment does not charge that the prisoner, at the time of finding the money on the highway, then knew the same to be the property of J. W. Key, the prosecutor.

And for a new trial.

1. Because larceny cannot be committed by a finder, in taking up bank bills found on the highway.

2. Because the confessions of the prisoner, made after promises of favor made to him by John A. Bradley and others, were admitted in evidence. See Bradley and Gooche's testimony, which show the promises were made before confessions proven by Key and Wood.

3. Because there is error in the finding of the jury, as the Court charged the jury, that they must find that the prisoner, at the very instant he took up the money on the high road, knew the same to be the property of the prosecutor, or they must acquit *the prisoner,—which knowledge, from the evidence [*504 was physically impossible.

4. Because the verdict is not only without but against the evidence, the law, and the charge of the Court.

Curia, per EARLE, J. The prisoner found a sum of money on the highway, which he soon after converted to his own use, with various circumstances of falsehood and concealment. On his trial for larceny, the Judge instructed the jury "if the prisoner, at the time of finding the pocket-book, and before he removed the money, knew it to be the property of the prosecutor; or not knowing it to be the property of the prosecutor, if, at the time of removing the money, he did it with the intent to convert it to his own use, it was larceny." It is on the latter paragraph of this instruction that the doubt of the Court arises. Of the correctness of the first part of the instruction, no question exists in the mind of the Court. And if the same verdict had been found on that alone, the Court might have been entirely satisfied with it. On the other branch of the instruction, the Court is divided; on that point no opinion is expressed. But as it is possible the verdict may have been influenced, in some degree, by that instruction, the Court is unwilling that the defendant should suffer on a verdict, when the law is at all doubtful.

A new trial is therefore ordered, without prejudice.

GANTT, RICHARDSON, O'NEALL and BUTLER, JJ., concurred.

See Supra, 382; 5 Rich. 241; 2 N. & McC. 90. *An.*

*505] *Bright Williamson *vs.* James King, Adm'r. of Bacot.

1. Where a demand is barred by the Statute of Limitations, nothing less than a direct promise to pay, and an acknowledgment of a subsisting debt, due and owing, and which the party is willing to pay, will take the case out of the bar of the statute.
2. The promise must be so explicit, that the extent of the party's liability will appear by the terms of the assumption.

Before Evans, J., at Darlington, Fall Term, 1836.

This was an action of assumpsit on four notes, and a due bill, viz.:

1st. Note dated 6th May, 1812, for £115 4*s.* 8*d.*, with a credit endorsed of $500 in January, 1817; payable to plaintiff.

2d. Note dated 7th July, 1819, for $875 14, payable to Williamson & Prince.

3d. Due bill 20th January, 1819, for $2 10.

4th. Note dated 23d January, 1821, for $436 32, with credits endorsed for $278 67, the last of which is 27th April, 1822. This note is payable to Williamson & Lide or bearer.

5th. Note dated 3d February 1821, for $457 16½.

The amount due on these various demands, with interest, is now upwards of $3500. The defendant pleaded the Statute of Limitations. Bacot died in October, 1833, and this action was brought at Fall Term, 1835. Bacot had been Sheriff of Darlington from 1821 to 1825, and there were, as was said, unsettled demands between the parties in matters appertaining to that office. To rebut the plea of the Statute of Limitations, the plaintiff offer the following evidence:

Peter C. Coggeshall.—Within three years before Bacot's death, he heard a conversation between Williamson and Bacot; Williamson's object seemed to be to avoid the Statute of Limitations; plaintiff said, we have not settled for a long time, and proposed fixing a day for settlement: Bacot said it made no difference about fixing a day; Williamson said, let us say before these gentlemen that nothing between us shall go out of date; Bacot hesitated and said he had never pleaded anything out of date; Williamson replied, in case of our death let us prevent our representatives from doing it; Bacot reluctantly assented, but the witness did not remember the words he used. The conversation related to all transactions between them, whether of the sheriff's office or in any way in which
*506] indebtedness could arise, *but neither these nor any other specific debts were mentioned; Thomas Williamson and Wingate were present.

Thomas Williamson.—Heard the plaintiff frequently propose a settlement; remembers that in the old Court House heard plaintiff speaking to Bacot about a settlement; Bacot said it made no difference, as nothing between them should go out of date. This was one, two or three years before Bacot's death.

The Court said in charging the jury, "In charging the jury I laid down the rule in conformity with *Young* vs. *Montpeoy*, Bail. Rep. that there must be a promise to pay, or a clear admission that money was due, from which a promise to pay would arise. I advised them that, according to my understanding of the rule, a promise generally not to plead the Statute, without reference to the demand sued for, was neither an express or implied promise to pay the debt for which the action was brought; and they found, in conformity with my opinion, for the defendant." The notice of appeal is annexed.

Grounds for new trial:

1. That the promise of the defendant's intestate not to plead the Statute of Limitations to plaintiff's demands, was sufficiently proved, and as proved was sufficient to entitle the plaintiff to recover.

2. That there was error in the charge of the presiding Judge, that a mutual promise between the plaintiff and defendant's intestate not to plead the Statute of Limitations to any demands subsisting between them at the time, was not sufficient to take the case from under the operation of the Statute of Limitations, unless there was in such stipulation express reference to the particular demand or debt intended to be revived.

Curia, per BUTLER, J. The plaintiff's motion in this case, must be refused, on the authority of *Young* vs. *Montpeoy*, reported in 2 Bailey. At the time the defendant's intestate had the conversation with plaintiff, some years before his death, he was under *no legal obligation* to pay any of the demands which the plaintiff has asserted in this action; they were, then, not subsisting demands, being barred by the Statute. The intestate Bacot might, however, have restored the demands and have subjected *himself to a legal liability to pay them, if they had not been settled. [*507

Nothing less than a direct promise to pay, or unequivocal acknowledgment of some specific demand or demands, would have subjected him to such liability. The promise must have been so explicit that his liability could have been made to appear by stating the terms of the understanding in a declaration, reference being had to the old demand for a consideration; that is, the extent of the liability must appear in the terms of the assumption. If one were to say, I will not plead the Statute, to a specific promissory note, or account, or bond, the liability to pay might be so distinctly admitted and implied that the party could not avoid it: but the extent of the liability would also appear at the same time. But where there is no specific demand mentioned or referred to, how can this appear? Bacot might have contested the original validity of some of the demands, if they had been mentioned; others he might have said were paid. To have resuscitated an extinguished demand, he must have acknowledged it to be unsatisfied at the time he had the conversation; which he did not. The case quoted by plaintiff from 8 *Durn. & Ea.* 181, will not sustain him. A credit was given on an account, by the consent of the party to be affected by it, *within* six years; Lord Kenyon held that it amounted to an implied promise to pay the balance. But here there was a specific demand referred to, and the credit was made before the statutory bar had run. If the credit had been made after the expiration of the six years, there might have been something in the case.

The motion for a new trial is refused.

EVANS, EARLE, GANTT, and RICHARDSON, JJ, concurred.

Dargan, for the motion. *Wilkins*, contra.

See 6 Rich. 122. *An.*

*508] *Lewis Moultrie *vs.* Robert Jennings.

It is now the settled law of the land, that a voluntary conveyance of a personal chattel, is good against a subsequent purchaser with notice, where there is no fraud in the gift.

2. The Act of the Legislature passed in 1832, on the subject of parol gifts, was never intended to do more than prescribe a rule to govern future cases. Its application could not extend to gifts created before its passage.

Before O'Neall, J., at Edgefield, Spring Term, 1837.

This was an action of trover, to recover the value of a negro woman, Jinsey, and her two children.

The right of the plaintiff to recover, depended upon a parol gift. The plaintiff was the youngest son of Lewis Moultrie, deceased, who was the stepson of Ebenezer Hill, who had no children. It was proved that Mr. Hill was much attached to his stepson. When the plaintiff was quite an infant, not more than two or three years old, in the year 1817, he was left with his grandmother and grandstepfather for a short time. On his mother's coming for him, Mr. Hill asked her, after some time, if Lewis had told her that he had given him a negro? She said, no. He said he had given one to her daughter, Sally, who was named after his wife, and that he had also given Jinsey to Lewis, who was named after his father, who had helped him to work for his property, and that he intended to make the other children of Lewis Moultrie, deceased, equal to these two, by will. In the frequent visits of the plaintiff and his mother to Mr. and Mrs. Hill, Mr. Hill would tell the plaintiff's mother that "Lewis's negro outgrew Sally's" and on some of these occasions, he would make Lewis bring in the negro child, Jinsey, to show her to his mother. To other witnesses, from 1823 to 1825, he said that he "*had given*" the negro, Jinsey, to Lewis Moultrie, the plaintiff; and it was always understood by one of the witnesses, that she belonged to the plaintiff. Subsequent to these declarations of Mr. Hill, on the 20th of January, 1829, he sold the negro, Jinsey, to the defendant; but according to the testimony of Seaton Moultrie, when the defendant first proposed to buy Jinsey, Mr. Hill told him that he had given her to the plaintiff. On the day on which the defendant bought Jinsey, a will, by which Hill had bequeathed her to the plaintiff, was burned; and after it was burned in his presence, the defendant asked if there was any thing else against the negro, beyond Lewis Moultrie's claim.

*509] *There was no other evidence in the cause which is necessary to be reported.

The defendant rested his defence upon the grounds, 1st. That there was no parol gift. 2. If there was, that he was a purchaser, for favorable consideration, without notice. 3. If he had notice, still as a purchaser for valuable consideration, his title was good against the plaintiff, a mere volunteer. 4th. That the Act of 1832 made the gift void. On the first ground the presiding Judge thus instructed the jury,—"That to make a good and legal gift, there must be a delivery, or that which is equivalent. (*Fulford* vs. *Lamar*, last July Session.) I told them that a delivery might be presumed from the words, "had given." That it was a mere question of fact, on which they had the right to decide. On the 2d and

3d, I said to the jury, that if the defendant was a purchaser for valuable consideration, without notice, that his title was in law to be preferred to that of the plaintiff. But if they were satisfied that he had notice of the plaintiff's claim, then that his title would be defeated by the previous gift. On the 4th, I said to the jury, that the Act of 1832 must have a prospective operation and effect; that it could not defeat the plaintiff's title, which was perfect before its passage. The jury found for the plaintiff $1,500, and I was entirely satisfied of the correctness of the verdict.

The defendant appeals.

[No grounds of appeal appear ever to have been filed with the record of this case; of course none can be given here. The grounds of appeal may be anticipated, however, from the report and the opinion of the Court.—REP.]

Curia, per EVANS, J. Upon the 1st and 3d grounds, it is sufficient to say, that they were facts which the jury have decided to the satisfaction of both the presiding Judge and of this Court. In relation to the 2d ground, I think it unnecessary to say more than that since the case of *Hudnal* vs. *Wilder*, 4 McC. 305, it has been considered as the settled law, that a voluntary conveyance is good against a subsequent purchaser, with notice. Such conveyances have been set aside in favor of subsequent purchasers and creditors, on the ground of fraud; but it would be absurd to say that a purchaser was defrauded by what he had notice of, at the time he paid his money. The 4th and last ground *insists that [*510 the Act of 1832,(*a*) on the subject of parol gifts, is a legislative interpretation of the law on that subject, and should govern the case, although the gift was made many years before the passage of the Act. How far the power of the Legislative department of this government can interfere with vested rights by declaratory laws, is a grave question, but one which will be decided promptly whenever it arises. We think it very clear that that part of the Act which relates to this case, was never intended to do more than to prescribe a rule to govern future cases; and it would be as improper as it is unnecessary to express any opinion on the subject.

The motion for a new trial is refused.

GANTT, EARLE, RICHARDSON and BUTLER, JJ., concurred.

Bauskett and *Wardlaw*, for the motion. *Griffin* and *Pope*, contra.

(*a*) 6 Stat. 483, § 2. *An.*

The Treasurers vs. W. K. Clowney, (Com'r in Equity.)

Where a commissioner in equity (upon the filing of a bill for injunction in his office) granted an order, that a writ of injunction should issue, upon the party's complying with the rule, by giving bond and approved security—and afterwards took a blank bond, or one that was informal, and informed the defendants to the equity proceedings, that he had taken a bond—whereupon, they were deceived as to its informality, and were never undeceived, until upon a trial at law upon said bond, they found it had been taken blank, and was therefore void. It was held, that the commissioner was liable upon his official bond, to the parties restrained and enjoined by his order, for the amount of the damages which they sustained, by reason of his laches and neglect.

[It is a contempt of the Court of Equity, for a plaintiff at law whose process has been enjoined, to proceed thereon, after the order for injunction and before the writ of injunction, if he has notice of the order. *An.*]

Before O'Neall, J., at Union, Fall Term, 1836.

This was an action on the official bond of the defendant as Commissioner in Equity, for not taking bond from the complainant in Equity, in a bill for an injunction. It appeared that several of the creditors of the late Mr. O'Kiefe, having recovered judgments against his administrator, which were unpaid, instituted such subsequent proceedings as enabled them to recover a *judgment for the respective amounts due to them, in the name of the *Ordinary* vs. *The Administrator, Mrs. O'Kiefe* and her securities; upon this judgment, execution was issued and lodged in the sheriff's office. A bill in Equity was filed by Mrs. O'Kiefe and her sureties, praying an injunction. The commissioner granted the prayer, and ordered that the judgment be enjoined, on the parties entering into bond and security to perform the decree of the Court. *No writ of injunction was issued.* The sheriff entered in his books that "the proceedings were stayed, on account of an application for an injunction." It appeared that the commissioner, intending to take a bond from the complainants under his order, permitted them to sign and seal a blank paper. The bill progressed to trial, and on demurrer was dismissed with costs. The paper signed and sealed as a bond was properly filled up, subsequent to the signing and sealing; and after the decree, an action was brought upon it, and it was adjudged to be void, and the plaintiff was nonsuited. It appeared on this trial, that neither the plaintiffs at law, nor their counsel, Col. Herndon, knew that the bond was executed blank. On inquiring of the commissioner, (the defendant,) Col. Herndon was informed that a bond had been given. O'Kiefe's estate was insolvent, but the securities of the administrator were good. The defendant told Col. Herndon, at some time during the proceedings had on the blank bond, that the persons executing it, agreed to take no advantage of the fact, that it was blank. The case now made, it seemed to me, did not materially vary from that before the Court of Appeals,(*a*) when a new trial was ordered. I therefore said to the plaintiff's attorney, that I thought he could not recover. He submitted to a nonsuit, with leave to move the Court of Appeals to set it aside; which he now does, on the grounds annexed.

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(*a*) Infra, 516. *An.*

GROUNDS OF APPEAL.

1. Because, the Court erred in deciding that it was necessary that a writ of injunction should actually issue to make the defendant liable.

2. Because, in this case, the giving of the blank bond and notice to the plaintiffs, or their attorney at law, that a good bond was given, was sufficient, without a writ of injunction issued, to make the defendant liable

3. Because the complainant took a bond he knew to be void, *and of which the plaintiffs at law, or their attorney, had no notice was taken blank, until the trial at law on the bond. [*512

4. Because the decision of the Court, upon the case made, was erroneous, and the nonsuit ought to be set aside.

Curia, per EARLE, J. This cause comes up a second time before this Court on a motion to set aside a nonsuit, ordered by his Honor who presided in the Court below, who conceived that the case made on the last trial, did not materially differ from that made on the first. This Court has come to a different conclusion; and in pronouncing their judgment, setting aside the nonsuit, it is necessary to consider the grounds of the former judgment, in connection with the prominent facts proved then, and now in order to show that the material facts, on which the opinion of the Court is now formed, were not in proof on the former occasion. This Court is too sensible of the importance of stability and uniformity in judicial decisions, to depart from those which have already been pronounced by their predecessors; and we should not hesitate to sustain the nonsuit ordered below, however great the hardship which the plaintiffs would suffer, if we did not perceive, to our entire satisfaction, that the plaintiffs may have justice, without overturning the former decision. And first, I think it obvious enough, from the terms used by Chancellor Harper, in delivering the opinion of the Court, that he had not before him the original order of the commissioner, enjoining the plaintiffs. He defines the writ of injunction, and the service, and proceeds, "the order of a Chancellor for the granting of an injunction is not certainly, of itself, an injunction; nor does it restrain the party, unless the conditions upon which it was granted shall have been complied with and the party notified that they have been complied with, by being served with a writ." The Act of 1825(*a*) extends to the master and commissioners in Equity the power to grant injunctions, which shall continue in force until the answer is filed, "in the same manner as the Chancellors are now authorized to do." The order granted by the commissioner is in these words. "On hearing this bill read, and counsel on the part of the complainants, it is ordered that the sheriff, John Anderson, and the judgment creditors, be restrained from further proceedings at law, on the executions within complained of, until a dissolution of this injunction on proper application made to a Chancellor, *on the complainants* giving *bond and approved security," dated June 29th, 1827. It will also be borne in mind, that by the Act of 1784,(*b*) notice of the application was required to the plaintiffs at law. This must be presumed to have been given; as also, notice to the sheriff, who by law was compelled to stay proceedings; and it now appears that he made such entry on his books. From this statement it will be perceived, that the order was not that a writ of injunction should issue; but an order that [*513

(*a*) 7 Stat. 330, § 10. *An.* (*b*) 7 Stat. 209, § 9. *An.*

neither the sheriff nor the plaintiffs should proceed, but be restrained therefrom, on complainants giving bond. Both having received notice of the application, the presumption is that they were present when the order was granted. As they did refrain from proceeding, the presumption is that they did so out of respect for an order emanating from a competent officer. But I would not put the case on that ground, seeing there is much stronger. The bond was pretended to have been executed on the 2d July, 1827, the third day after the order. It had the semblance of being a good bond; it was filed in the proper office; taken by the commissioner, and in pursuance of the order, who made the order; and the important facts are now in evidence, which were not proved before, that the plaintiffs immediately afterwards, on inquiry of the commissioner, were informed by him that the bond had been given; and that they never were apprised of the bond being void, until the trial of the action at law, which they subsequently instituted upon it. These facts, I conceive, present a case materially different from the former one. And the case now comes to this—were the plaintiffs at law, according to the rules and practice of the Court of Chancery, liable to contempt if they had proceeded at law, after such notice as they had received?—admitting for the present that their right to recover here, depends upon that test; for it has been put upon that ground by Chancellor Harper. The cases from 3 Atk. 564 and 567, are very much to the point, especially the last, where a plaintiff at law was held in contempt, who had proceeded after an injunction granted, although the writ had not issued. But there are later cases. In *Osborne* vs. *Tenant*, 14 Ves. 136, a motion was made to commit the defendant and his attorney, for a breach of injunction to restrain execution under a judgment. The affidavit in support of the motion, stated that the defendant and his attorney were in Court when the motion was made; theirs stated that they did not hear the order. *514] Lord Eldon said, "if these parties by their attendance *in Court were apprised that there was an order, that is sufficient; and I cannot attend to a distinction so thin, as that persons standing here, until the moment the chancellor is about to pronounce the order, which from all that passed, they must know will be pronounced, can by getting out of the way at that instant, avoid all the consequences. *James* vs. *Downs*, 18 Ves. 521, is to the same point. These were cases of injunctions to stay proceedings at law. The same point has been ruled in relation to other special injunctions, in *Kempton* vs. *Eve*, 2 V. & B. 348, and *Vasandan* vs *Rose*, 2 J. & W. 264. Let it be conceded that these cases apply only to an attempted evasion of the order, without allowing time for the condition to be complied with, and the writ to issue, and that they do not reach so far as an indefinite delay, as is clearly intimated in *James* vs. *Downes*; yet the case is presented in a different aspect, when we consider that the plaintiffs were officially informed, in answer to any inquiry, that the condition had been complied with, and the bond given. Without inquiring further into the effect of the terms of the order, that the plaintiff be restrained *eo instante*, for that depends on Equity practice, with which we are not familiar, (although we are informed by a learned Chancellor, that it is not usual to issue writs in form, and that the order and bond are considered as restraining the party, who would be regarded in contempt if he pro-

ceeded,) I put the case on the ground, that the complainants in Equity, having complied with the condition and given bond, were entitled to the writ of injunction, which might have issued at any moment. At that instant, the plaintiffs at law being informed of this fact altogether refrain from further proceeding at law, and plead to the bill in Equity for injunction, and proceed to trial there, with the knowlege of the commissioner, and, as he knew in consequence of his information. Supposing then the bond to have been good, could the plaintiff at law afterwards say, that as no writ had issued, he would proceed at law? I apprehend not. It would be just as if a defendant at law should move to set aside the service of a writ, which he had verbally accepted or agreed to waive, after pleading to the declaration. The plaintiffs had waived the issuing of the writ. They had afforded the complainants in Equity the full benefit of their injunction, under the belief induced by them, and by the commissioner, that every thing had been done necessary to entitle them to the writ. For the cause went on to final hearing on *the bill. In that state of the case, supposing the bond to have [*515 been duly executed, and an action brought on it, would it have availed the complainants in Equity, defendants at law, to plead in bar, that in fact no writ ever issued, and therefore, the plaintiffs were not actually enjoined? To state the proposition is enough to refute it. They would have been estopped from denying that a writ had issued, after having the full benefit of it. The answer to that inquiry, I am disposed to regard as the true test of the defendant's liability in this action. If I have succeeded in showing that the plaintiffs would have been in contempt if they had proceeded at law, after waiving the writ and pleading to the bill, it would seem to be clear, and for a stronger reason that the complainants in Equity would be liable, on their bond, after failing in their bill. Here I will refer again to the opinion of the Court, on the former hearing, to show that their judgment was based on a supposed state of facts disproved by the present trial. "But if the defendant should neglect to give bond, after a reasonable time allowed for that purpose, or should give a bond *manifestly* informal and insufficient, like the present, certainly the complainant would be guilty of no contempt in proceeding. The party certainly cannot be entitled to the benefit of the order, who neglects or refuses to comply with the terms on which it was granted. In this case I have no doubt that the plaintiff might properly have proceeded, after he discovered what sort of bond the defendant had given." From this it is apparent, that the Court supposed the plaintiffs at law to have been early informed of the informal execution of the bond; or to have delayed without any information at all that a bond had been given. The fact turns out to be that they were informed that a good bond was given, and that they never knew otherwise until the trial of the action at law upon it, when it was too late to proceed on their executions. In fact they could not have known that the bond was otherwise than good, nor have discovered it to be otherwise, by any examination they could make. So far from being *manifestly* informal, it wore the appearance of a perfect instrument, and they had the assurance of the commissioner that it was so. What then is the liability of the commissioner? The uniform practice in this State, since the Act of 1784, has been for the commissioner to take the bond. He is

required to approve of the security. He is the ministerial officer to issue the writ; and whether it be most proper that the bond should be to him
*516] *or to the plaintiffs at law, yet it is equally his duty to see that it is taken and filed; as much so, as it is the duty of the Clerk in the Court of Common Pleas, to take the bond in cases of attachment. He has undertaken to do it. He granted an order restraining the plaintiffs *eo instante* the bond was given; and then informed them that the bond was executed; which had the effect of an actual injunction, by which the plaintiffs were restrained; which had the effect of an actual injunction, by which the plaintiffs were restrained; and by which it must be presumed he intended they should be restrained. If it had been otherwise, can it be supposed that he would have permitted the plaintiffs to go on to trial in Equity, without undeceiving them? It cannot now be allowed, that he shall avail himself of the plaintiffs facility in waiving the writ, or of their respectful obedience to his own order, to screen himself from the consequences of his negligence, or his unmerited confidence in the complainants. If the commissioner did not intend that his order should operate, and yet knew that it had operated, as an injunction, it was incumbent on him to have apprised the plaintiffs of the necessity of a writ, and that none had issued; or to give them the earliest notice that the supposed bond was a nullity. Having done neither, all the presumptions are against him; and the Court are all of opinion that he must be held liable on his bond, for the amount of the plaintiffs' damages.

The motion to set aside the nonsuit is granted.

GANTT, EVANS, RICHARDSON and BUTLER, JJ., concurred.

Herndon, for the motion. *Thompson*, contra.

As to Commissioner's ordering injunctions—See *Aldrich* vs. *Kirkland*, 8 Rich. 349. Act of 1840, 11 Stat. 110, § 8, 17. *Norris* vs. *Williams*, Id. 58. *An.*

IN THE COURT OF 10.

THE TREASURERS *vs.* W. K. CLOWNEY.

Before GANTT, J., Union, Fall Term, 1835.

Judgments were obtained at law against Amelia A. S. O'Kief, as administratrix of Thomas O'Kief. Afterwards an action was brought on the administration bond, to which Jos. McJonkins and Shelton Swift were securities—and judgment thereon. Next *was filed a bill in Equity, to stay proceedings at law. A decretal [*517 order was obtained, allowing an injunction on giving bond, (see the order.) An appeal was taken from the decree made by the Court in Equity, which ended in a reversal of the decree and dismissal of the complainants' bill. (These proceedings will all be shown, I can only refer to them.) An action was then instituted on the bond taken by the Commissioner in Equity, under the decretal order, and a nonsuit was ordered, on the ground that the commissioner had taken a blank bond which created no responsibility. The present action was then brought on the bond of the commissioner, for his default in not having taken a sufficient bond. This mingled chain of litigation, involving both Law and Equity, took up much time and branched out into a variety of views, as will more distinctly appear by reference to the many grounds taken for an appeal. By the Act of 1791,(*a*) December 1st, Brev. 205, sec. 39, commissioners in Equity are required to give bond to answer for any misfeasance or default, in like manner as Ordinaries by the Act of 1789 are made responsible in damages for their neglect. Before the Act of 1784,(*b*) (see 1 Brev. 203, sec. 20,) a complainant seeking relief for a verdict or judgment at law, had to *deposit the sum* for which the verdict of judgment was had, before he could obtain an injunction, but the Act of 1784 allows an injunction, on a complainant swearing to the truth of the bill and *giving bond and security* to be approved by the Master in chancery *for such sum and with such condition as the Court shall direct*. A subsequent Act(*c*) has invested the master with a power of granting injunctions, and the decretal order in the case before us was made by the commissioner, Mr. Clowney.

The bond and security required by the Act of 1784, must be such, that in the event of failure on the part of a complainant, the amount which had been recovered, should be secured by the bond. It is a substitute for the deposit of the money before required. It was contended that the act of the commissioner in this proceeding was altogether judicial, and created no responsibility. I thought otherwise. The granting the injunction was unquestionably a judicial act.(*d*) The accompanying direction, that bond should be given, was no more than what the law required, and not of a judicial character ; and if it were to be so considered, still the taking a bond under the decretal order would be altogether a ministerial act, and the omission to take would be a default on the part of the commissioner, which would make him liable, and to the extent of what had been recovered.

The charge of the Court to the jury was, that the commissioner was liable for his default in not taking the bond, and to the extent of the judgment—The jury found accordingly.

(*a*) 7 Stat. 258, §§ 4, 5. See Act of 1813, 7 Stat. 315, § 4. *An.*
(*b*) 7 Stat. 219, § 9. *An.* (*c*) 1825, 7 Stat. 330, § 10. *An.*
(*d*) 7 Rich. 65, 70.

Defendant appeals. For nonsuit.

1. Because the defendant, in doing the act complained of by plaintiff in this case, acting in his judicial capacity, and is therefore not liable to a civil action.

2. Because the commissioner in Equity, on granting an injunction under the Act of 1825, is not required by law to take any bond.

3. Because the commissioner is not bound to take any bond in cases of injunction. under any statute of this State. The Act of 1784, prescribes that the bond shall be given to the plaintiff; and the only duty required of the commissioner, is to approve the security. And the Act of 1791, requires the bond to be given to the sheriff; and the commissioner is therefore not liable on this official bond, for misfeasance or default in his duty.

For a new trial.

1. Because the defendant is not liable to a greater extent than the value of the assets of O'Kief's estate, in the hands of the commissioner to be administered, *518] which was *$11.91 in the hundred dollars; the Court held, he was liable for the full amount of plaintiff's debits against the estate of O'Kief.

2. Because defendant, if liable, is only liable for the costs in the injunction case, as the condition of the bond was, that the obligers should stand to, abide and perform the decree in Equity, which was, "that the bill should be dismissed with costs."

3. Because the Court should have instructed the jury, that if they should find, that the defendant, when taking the bond, really and in truth thought and believed that the bond, in the form it was taken, was legal and binding on the parties, then that would only constitute an error in judgment, for which he would not be liable.

4. Because the injunction bond, being filled up from the memoranda $500 and the date, and being signed, sealed and witnessed; and being filled before the trial, was a good and valid bond.

5. Because there was no writ of injunction actually sued out, and the plaintiff at law, in the suits intended to have been enjoined, were not legally restrained from proceeding at law, and suspended their proceedings from choice.

6. Because there was no injunction in existence, after the coming in of the demurrer, and plaintiffs might have proceeded at law.

Curia, per HARPER, Ch. My opinion will be expressed with reference to the fifth ground of appeal, "because there was no writ of injunction sued out, and the plaintiffs at law in the suits intended to have been enjoined, were not legally restrained from proceeding at law.

The Act of Assembly of 1784, under which the bond in question was given, provides, "and whereas, the obliging a complainant, seeking relief from a judgment or verdict at law, to deposit the sum for which such judgment or verdict was obtained, before an injunction to stay execution, although his prayer is manifestly founded in Equity, hath been and would be attended with much inconvenience to suitors, and in many instances, may amount to a denial of justice." "Be it therefore enacted, that a party applying for an injunction to stay proceedings in an action at law, or judgment, or execution, or the levying of execution, shall be entitled to such injunction, on making oath or giving his affirmative (according to the form of his profession,) to the truth of his bill, and giving bond to the plaintiff at law, with security to be approved by the Master in chancery, for such sum and with such condition as the Court shall direct," &c.

Now, it is hardly necessary to say, that by the word injunction, is commonly meant the *writ* of injunction. "An injunction is a writ issuing by the order and under the seal of the Court of Equity." Eden on Injunc. 1. "An injunction is a remedial writ, in nature of a prohibition."

2 Harr. Ch. 20. "The writ of injunction is served by showing the original under seal, and delivered a true copy thereof, to the party himself." Id. 267. The order of a Chancellor for the granting of an injunction is not certainly of itself an injunction, nor does it restrain the party, unless the conditions upon which it was granted shall have been complied with, and the party notified that they have been complied with, by being served with the writ. The officer of the Court, however, is bound at his peril, to see that the conditions have been complied with, and a bond given conformable to law and the order of the Court before issuing the writ. The Act of the commissioner in sealing and delivering the writ is certainly a mere ministerial act; and it does not in any degree alter the character of the act, that in order to its performance, he must incidentally exercise a discretion in determining for himself a question of law. There is hardly any ministerial act which may not involve such an exercise of discretion. The sheriff must often decide at his own peril, questions of law involving the title to property, before taking goods in execution. The taking of bail is a ministerial act, yet the sheriff must *decide for himself, not only on the sufficiency of the security, but the proper form of the bond. If in this case, [*519 the writ had been actually issued, what would have been the breach of his official bond assigned in an action against the commissioner? It would have been that the defendant had issued the writ before a bond had been given conformable to law and the order of the commissioner. Under the Act of 1825, the defendant was, for this purpose vested with the power of a chancellor, and acted in that capacity in granting the order. And on that breach, the action must have been sustained; for in contemplation of law, no bond at all was taken. And it is immaterial whether the giving a bond to the commissioner for the security of the plaintiff at law, be a sufficient compliance with the law directing the bond to be given to the plaintiff, or not. In either case, the commissioner would have issued the writ before the law was complied with. I may observe, however, that in my opinion, the giving of a proper bond to the commissioner would have been a substantial compliance with the law. The obligor would certainly, so far as I can see, be bound by such a bond. It may be regarded as given to the officer in trust for the plaintiff, and would afford him the same security as if given directly to himself. The universal practice, in which it would be dangerous and inconvenient to innovate, has established this as a sufficient compliance with the law.

It is true, that in the anonymous case, 3 Atk. 567, where a party had been served with a writ of injunction, not sealed, and nevertheless proceeded at law, and there was a motion to attach him for contempt, the Chancellor said, "As to the injunction's not being sealed, that is no excuse for his proceeding at law, after the injunction was granted, because there have been instances here where a defendant, or his attorney only, have been present upon an order for an injunction, and they have proceeded at law before it has been sealed, that the Court has considered this as a contempt, and committed the persons for it." On the same principle was the decision in *Skipp* vs. *Harrwood*, Id. 564, where a defendant was present in Court, when a decree was pronounced, appointing a receiver, and on the same morning, before the decretal order was formally passed, removed goods in order to elude the decree, the Chancellor committed

him for a contempt. So, I have no doubt but that with us, if upon the granting of an order for injunction, the plaintiff at law, with a view to elude the order, should at once proceed before time were allowed for giving the bond and sealing and serving the writ, he would be in contempt. But if the defendant should neglect to give any bond, after a reasonable time allowed for the purpose, or should give a bond manifestly informal and insufficient like the present, certainly the plaintiff would be guilty of no contempt in proceeding. The party certainly cannot be entitled to the benefit of the order, who neglects or refuses to comply with the terms on which it was granted. In this case, I have no doubt but that the plaintiff might properly have proceeded, after he discovered what sort of bond the defendant had given. And here it may be observed, that the party must exercise the very same sort of discretion as that exercised by the commissioner, which has been supposed a judicial discretion. He must necessarily decide for himself, as he may be advised, whether the law had been complied with by the giving of a sufficient bond, and proceed at his own peril, if he shall be found to have decided amiss. But neither to him nor the commissioner, as such, has the law given any judicial authority, so as to decide directly on the character or validity of the instrument, and bind other individuals or tribunals by his determination.

The motion for new trial is granted.

Richardson, J., Johnson, C., O'Neall, J., Evans, J., J. Johnston, C., Butler, J. and De Saussure, C., concurred.

See Supra, 510. *An.*

INDEX TO BOTH VOLUMES.

[The folios in this Index marked with an asterisk (*) refer to the folios of the former edition; those unaccompanied by the asterisk to the present issue. The volumes are designated by the numerals (i., ii.,) preceding the folios]

ABATE.

1. A *sum. pro.* brought on a note drawn payable to William Alexander & Brothers; pending the suit, William Alexander died. On the trial, the presiding judge ordered a nonsuit—nonsuit set aside, and ordered to be marked abated, it being the proper order that should have been made under the circumstances. *Alexander & Brothers* vs. *Davison & Davison*, ii., *49..... 380

ABSENCE FROM THE STATE.

1. Where a party (*defendant*) is temporarily absent from the State, and a copy writ, with a notice endorsed thereon, is left at his residence during his absence, it was *held* to be a good and valid service of such writ. *Bank of S. C.* vs. *Simpson*, ii., *352..... 573

ACCEPTANCE. See *Attorney* 2; *Administrator.*

ACTION ON THE CASE.

1. Any words occasioning actual damage to one, are actionable, and it is not necessary that they should be defamatory.

Sed, this doctrine, however, must be taken subject to the *limitation*, that the injury complained of must not be the unlawful acts of others, because they are answerable themselves, and the damage sustained must be the immediate consequence of the defendant's words. *Bentley* ads. *Reynolds*, i., *16..... 10

2. In an action on the case, where the facts as to probable cause are not disputed, a Judge may take upon himself to say what is, and what is not, probable cause. But where the facts are contested, probable cause becomes a mixed question of law and fact, to be decided by the jury, under the instructions of the presiding judge. *Paris* vs. *Waddell*, i., *358..... 233

3. In an action on the case, for employing a slave that is runaway, to entitle the plaintiff to recover damages, where he has alleged the defendant's acts to have been done with a *scienter* of the fact that the negro was the runaway slave of the plaintiff, he must prove the *scienter*, unless, from the circumstances, the law would presume it. *Bell* vs. *Lakin*, i., *364..... 237

ADMINISTRATOR.

1. When a defendant, in an action against him, as administrator, fails to plead "*plene administravit*," but rests his defence upon the plea of "*non est factum*," or some other plea, and a recovery is had against him on such plea, the judgment thus obtained is *prima facie* evidence to charge the administrator, in an action suggesting a *devastavit;* and the return of *nulla bona* on the execution, is evidence of the same character.

2. The return of *nulla bona* is not conclusive, and the defendant is not precluded from showing that he had no assets of the intestate's estate to be administered. *Young* vs. *Kennedy*, ii., *80..... 399

ADMINISTRATION BOND.

1. A creditor may sue upon an administration bond, without citing the administrator to account before the Ordinary, or obtaining a decree against him.

2. In such case, it is necessary to show, that the demand has been established against the estate; and that assets came to the hands of the administrator sufficient to pay it, which have been wasted or misapplied. *The Ordinary of Charleston* vs. *Hunt*, i., *380..... 247

3. A judgment at law against the administrator for the original demand, with a return of *nulla bona* on execution, together with proceedings in Equity, to which the administrator was a party, and by which it appeared that assets had come to his hands sufficient to pay the demand, but which he had applied to the payment of debts of inferior degree, are sufficient to entitle the creditor to recover from the securities..... *Ib.*

AFFIDAVIT.

1. An affidavit to hold to bail, stating that the defendant was indebted to the plaintiff "in the sum of one hundred and forty-five dollars, on a note and due bill, bearing interest," was held to be a sufficient compliance with the Act, and an *exoneretur* on the bail bond was refused. *Tobias* vs. *Wood*, i., *103..... 69

2. Where a party swears that the defendant is indebted to him, he swears in a legal point of view and in legal parlance, to a present debt that is due, and not a future one..... *Ib.*

AGENT AND PRINCIPAL.

1. One, being the agent of another, drawing a promisory note, and signing it with his own name, thus: "Daniel McLean for John McLean," it was held that it was the note of "Daniel McLean, the agent, and not the note of the principal. *Taylor* vs. *McLean*, i., *352. 229

2. An auctioneer's clerk is not such an agent, within the statute of frauds, whose entry will bind the party; unless the authority of the clerk (to make the entry) has been specially obtained from the party who is bound by his act, or he has afterwards assented to be charged by it. *Entz* vs. *Mills & Beach*, i., *453..... 300

AGREEMENT.

1. The plaintiff and defendant entered into a special written agreement to submit the matters in dispute between them to counsel; but no particular counsel was named, or time when the matter was to be so submitted—defendant agreeing to pay according to the instructions of the counsel; and in default of their getting a decision, then the plaintiff was to file a bill in the Court of Equity, and the decree of that Court was to be conformed to by the defendant. This was held to be an agreement to arbitrate. *Percival* ads. *Herbemont, Adm'r.*, i., *59..... 38

2. An agreement to arbitrate, or a bond to submit to arbitration, may be the subject of a suit when the damages stipulated, or the penalty will authorize a recovery; but such an agreement or bond would not deprive either party of his remedy in the Courts, or oust them of their jurisdiction in regard to the matter in dispute..... *Ib.*

3. A vineyard, though not annually planted, requires great preparatory attention, as well as much agricultural labor and cultivation to bring the fruit to perfection; and the products arising therefrom may be denominated a crop; and hands employed in agricultural pursuits, whether in a vineyard or a cornfield, are liable to be retained by the administrator of an estate, after the first of March, until the crop is gathered, or at farthest until the last of December, should the crop not be gathered before that time..... *Ib.*

4. Where the plaintiff, being tenant for life, and the remainderman during his life time, entered into the following written agreement, "that the said C. H. do agree to let E. H. build on the land willed to him by his father, at the death of the said C, H. the said C. H. do also agree that E. H. may open and make all the improvements on said land that he thinks proper. The said E. H. do agree not to interrupt any thing that belongs to the said C. H. in person or property. If the said E. H. should interrupt or suffer any of his family to interrupt any thing belonging to the said C. H. the said E. H. do agree to pay the full value in cash, or forfeit all the improvements on said land." It was *held*, that the plaintiff had not, by this agreement, surrendered to the remainderman her freehold for life. That this paper conveyed nothing more than a tenancy at will, or a lease to terminate upon reasonable notice, or a privilege during his life and peaceable behavior.

5. The Court say, "that in such anomalous agreements, we must look to the instrument itself for its own construction, as identical papers cannot be found already adjudged." *Hatcher* vs. *Hatcher*, ii., *429..... 621

ALIENS.

1. Where one died intestate, seized and possessed, in fee-simple, of a house and lot in the city of Charleston, leaving surviving him, as his next of kin, a wife, the (defendant, who is an alien,) and nephews, born of alien sisters, and a brother, a native born subject of the United States, but who has resided in France for the last thirty years—in an action of trespass to try titles to the said freehold, between the nephews (sons of the alien sisters of the deceased,) and the wife, it was *held*, that upon the death of the intestate, the freehold descended upon the brother of the intestate; that he alone could take the estate under the statutes of South Carolina. *Descottes & Driscoll* vs. *Talvande* ii., *300..... 539

ALLEGATA AND PROBATA.

1. He who brings an action, on a written instrument, must set it out correctly; and that which he offers in evidence, must correspond with that which he has described. The name of the original payee, to a promissory note, is an essential part of the description. And a misrecital is fatal. *Cherry* vs. *Fergeson*, ii., *15..... 361

APPEAL.

1. A defendant who is a party to an appeal, is bound to take notice of the result of the appeal; and where a defendant pending an appeal, has left the "prison rules," so soon as the appeal is decided against him, he should return within the rules; otherwise his bond is forfeited. *Baker, Johnson & Co.* vs. *Bushnell*, i., *272..... 178

ARBITRATION AND AWARD. See *Agreement*, 2.

1. When a case is referred to arbitration, the object is to supercede by the judgment of the arbitrators, the verdict of a jury. It would follow, that the award should be either for a certain sum ascertained, or for a sum capable of being ascertained by reference to some part of the record. *Coxe* vs. *Gantt*, i., *302..... 197

ARREST OF JUDGMENT, See *Verdict*, 3.

ASSAULT AND BATTERY. See *Evidence*, 6, 7.

ASSIGNMENT.

1. A debtor taking the benefit of the "Prison Bounds' Act," rendered in his schedule, *inter alia*, a small tract of land, and assigned his schedule to W. F. P. (the plaintiff in the case on which he had

been arrested.) W. F. P. afterwards assigned his right to the assignment, the judgment and the *ca. sa.'s* not under seal, and without witnesses to the plaintiff. He constituted P. E. P., his attorney, to sell the land, who advertised, sold, and became the purchaser of it, and afterwards conveyed to the plaintiff: *Held*, that the deed of P. E. P., was null and void, and that the assignment of an assignment cannot have the effect to pass land. *Jones* vs. *Crawford*, i., *373.... 243

2. An instrument to pass the title of land, must be under seal and witnessed by two witnesses..... *Ib.*

3. The true view of an assignment under the "Prison Bounds' Act," is not that it vests the assignor's estate absolutely in the assignee, but that it operates as a mere authority to him to enter upon, recover, sell, and convey, in satisfaction of the debt..... *Ib.*

ASSUMPSIT. See *Husband and Wife*, 1.

1. A merchant having in store the cotton of divers persons to ship, and does ship it, and it is lost by some means: *Held*, that assumpsit is the proper form of action to recover the price of the cotton. *Lyles* vs. *Administrators of McFie*, i., *21..... 14

2. Every person who undertakes any duty, trust, office, or employment, impliedly contracts with those who entrust or employ him to perform his undertaking with skill, diligence and integrity; and the employer may maintain an action of assumpsit against him for any injury which he has sustained through the absence of any of these qualities..... *Ib.*

ATTACHMENT.

1. The Act of 1799, requiring the plaintiff in any writ of attachment to enter into bond, before the Clerk of the Court of the district in which such writ of attachment is issued to the defendant, in double the amount of the debt or demand for which the attachment is issued, requires that the bond given shall be only executed by the plaintiff or his attorney in fact, and acting in his room and stead. No other person is authorized to execute such bond. *Myers* vs. *Lewis*, i., *54. 35

2. Defendants purchased from plaintiff a box of goods, which plaintiff had received from Pitray & Viel, by a power of attorney from one Cuvillier, and upon which plaintiff had paid the expenses, and was in the said power of attorney declared the purchaser. After the sale by plaintiff to defendants, a writ of foreign attachment was issued against the said Cuvillier *ads.* Charles Jugnot. The account was afterwards attached in the hands of the defendants, and the money paid by them into Court, without notice to the plaintiff. *Held*, that the plaintiff was not estopped by the proceedings in attachment from recovering against the defendants the price of the box of goods; and their paying the money into Court did not discharge their liability. *Olin* vs. *Figereaux & Champy*, i., *203..... 132

3. There is nothing in the Attachment Act which would require one to come into Court and litigate his rights in a suit to which he is not a party..... *Ib.*

4. There is nothing in the attachment law which precludes a defendant from availing himself (on a motion,) of any defect or irregularity in the process of attachment. *Harper* vs. *Scuddy*, i., *264..... 173

5. The 8th section of the attachment Act, passed 1744, contains the provision "that if, at any time, within the year and day, any person shall appear as attorney to the absent debtor, and will put in bail to answer the action, and pay the condemnation," then the *attachment* shall be dissolved.

6. The 4th section of the Act of 1785, provides, "that all attach-

ments shall be repleviable, by appearance, and putting in special bail, if by the Court ruled so to do."

7. These provisions constitute the law upon the subject. And the Act of 1839 has not altered the old law. *Vide* 3 *McC.* 347. *Fife & Co.* vs. *Clarke, as illustrative of the law. Crosslin* vs. *Reed & Reed, et al.* ii., *10..... 56

ATTORNEY.

1. Where an attorney, acting under a power of attorney from the attorney of the principals, recites, in the deed of release, the power from the principals to the attorney, or person from whom he derives his powers, and in the body of the said release says "by virtue of the authority vested in me as aforesaid, and in the name and in behalf of the said Varnum, Fuller & Co." (the principals,) "and others, I accept the provisions in the said assignment, made in this behalf, and do further release and discharge, &c. Signed, J. Winslow, [L.S.] attorney for C. P. M. J. Winslow, [seal] agent for Varnum, Fuller & Co." It was *held*, that this execution was in compliance with the rule which requires a deed executed by an attorney to be sealed and delivered in the name of his principal.

2. An acceptance of a provision under a deed of assignment, and a release of the principal, with the assent of the security, is equivalent to a discharge by operation of law, and the rights of all concerned are the same under one as well as the other. *Varnum, Fuller & Co.* vs. *Evans*, ii., *409..... 608

ATTORNMENT.

1. Where a party enters upon land, as the tenant of another, he cannot dispute the title of the party under whom he entered, by attorning secretly to a stranger. *Camden Orphan Society* vs. *Lockhart, et al.* ii., *84..... 402

AUCTIONEER. See *Agent and Principal*, 2.

AVERMENT. See *Pleas and Pleading*, 3. *Slander*, 4.

BAIL.

1. A plaintiff after the defendant had been arrested by virtue of an order for bail, has a right to discharge the bail from any liability; and also to discharge the defendant without his consent, although he may have given bond for the prison rules, and filed his schedule, with the view of taking the Insolvent Debtors' Act. *Clarke, McTier & Co.*, vs. *Simpson*, i., *286..... 187

2. A prisoner confined under an order for bail, and who has filed his schedule with the clerk, and given notice to his creditors of his intention to take the Insolvent Debtors' Act, cannot take this Act where he has been discharged by the plaintiff at whose suit he has been arrested. *Ib.*

3. It is questionable whether a defendant can be arrested pending a suit, where he has been previously arrested and held to bail, and by the plaintiff discharged..... *Ib.*

BAILEE.

1. Where money has been placed in the hands of a party, as agent or bailee, with instructions for a particular purpose, and the bailee has acted in pursuance of these instructions, the adminstrator of the person placing the funds cannot sustain an action of assumpsit against the bailee, for the particular fund. *Simpson, Adm'r*, vs. *Barry*, ii., *369.

2. The general rule unquestionably is, that if the owner of a chattel hire it to another he cannot maintain either trespass or trover against a third person, in respect to an injury to, or conversion of it, during

the time it is so hired. But to this general rule there is one exception, which is, if the bailee do an act inconsistent with the bailment, and calculated to defeat the rights of property of the owner, he may treat the bailment as ended, and maintain trover.

3. Where a married woman, previous to her marriage, executed to the plaintiff a deed of trust, for certain lands and slaves therein named, by which it was the duty of the trustee to permit the *cestui que trust* during the term of her natural life, to use, possess and enjoy the rents, profits, issues, interests and emoluments, of the said lands therein mentioned, together with the profits, hire, labor, and services of the slaves aforesaid; and the use, profits and increase of the stock and furniture aforesaid, without any limitation whatever: provided always, the same shall in no wise be subject to the control, debts, contracts, or intermedling of any future husband, or other person whatsoever; and provided the said personal property in said deed shall not be removed out of the district of Charleston without the consent of the trustee (the plaintiff) first obtained in writing. The plaintiff hired the slaves to Baxter, with whom the *cestui que trust* had intermarried, and they were in his possession in Orangeburg district at the time they were taken by execution against the said Baxter, and sold. *Held* that the plaintiff could maintain trover for the conversion of the slaves sold, against the purchaser at sheriff's sale, it being in direct violation of the terms of the trust. *Clark* vs. *Pooser* ii., *434..... 624

BASTARDY.

1. Two indictments may be sustained under the Act of 1839, against the putative father of two bastard children, born at one birth, but the indictments and the recognizances should describe each child by name and complexion, hair and sex, or by some means of separate identity. *The State* vs. *Derrick*, i., *338..... 220

2. The Act of 1839, is a repeal of 1795, on the subject of bastardy. *Ib.*

BILLS OF EXCHANGE, NOTES AND BONDS.

1. A blank note signed by a firm with sureties thereto, and by one of the firm placed in the hands of the plaintiff, a factor in Charleston, as collateral security for acceptances of drafts, to be drawn on him by the firm, and afterwards filled up in good faith by the plaintiff, in accordance with his instructions, with the sum of $5000, the sum agreed on by them at the time the note was left, was held not to be void, and that the plaintiff had the same right that an endorsee would have to fill up the terms of an endorsement above the name of his endorser. *Carson* vs. *Hill & Jones*, i., *76..... 50

2. The plaintiff after he accepted drafts drawn by the firm, to the amount of $7,500, acquired as perfect a right to the note as if he had bought it; and his right could only be divested, and the defendants' liabilities discharged by payment..... *Ib.*

3. All the payors to a joint and several promissory note are principals, and their relation to each other does not effect their liability to the payee..... *Ib.*

4. Where a guaranty is absolute in its terms, and definite as to its amount and extent, in such case no notice to the guarantor is necessary..... *Ib.*

5. Where a debtor does not direct the application of money paid to any specific demand, where there are two or more, the creditor who receives the money may make his own application..... *Ib*

6. The surety is bound by the terms of the contract, and cannot be discharged unless the principal varies the terms of the original contract, by enlarging the time of performance..... *Ib.*

7. A note given for usurious interest, by the Acts of 1777 and 1831

is void, as well in the hands of an innocent holder, as between the original parties to it; and usury may be given in evidence under the *plea of the general issue* in assumpsit, the whole note having been given for usury. *Gaillard* vs. *LeSeugneur*, i., *225..... 146

8. The husband of a "*feme sole trader*," is a competent witness to prove usury under the Act of 1777..... *Ib.*

9. He who takes a note after it is due, takes it subject to any defence which the maker can set up against the payee; and when the action is in the name of an endorser or bearer, to entitle the defendant to set up by way of discount, any matter between him and the payee, he must prove that the note was transferred after due, and that the matter of defence existed between them at the time of the transfer. *Cain, Ex'x.* vs. *Spann*, i., *258..... 169

10. A note dated January the 8th, 1838, with the words "with interest from the first day of January last,"—*Held*, that the time from which interest was to be computed, was the first day of January, 1837. *Calhoun* vs. *Reynolds, et al.*, i., *304..... 198

11. The rule of law is, that a doubt shall be solved against him whose business it was to speak without ambiguity..... *Ib.*

BOND. See *Commissioner in Equity*, 1.

1. A bond given under the Trover Act of 1827, to the sheriff, is not assignable; and the assignee of such a bond cannot sue, in his own name, on the bond. *Smith* vs. *Cook & Norris*, ii., *58..... 385

2. A replevin bond, given to the sheriff by a party, to prosecute his action in replevin to judgment, is assignable, and the surety thereto is liable to the same extent that the principal would be. *Keckly* ads. *Harris*, ii., *196..... 474

3. Where an action is brought by a party on a legal bond given under the Trover Act of 1827, "to be answerable for all damages which the defendant may sustain by any illegal conduct, in commencing and conducting the said action of trover," and the party suing on the said bond recovers, a new trial was ordered, unless the plaintiff would release all the verdict except so much as was rendered for the taxed costs of the former action. *Vide Brown* vs. *Spann* 3 Hill, 324, and note thereto. *Dehay* ads. *Ferguson & Dangerfield*, ii., *228..... 495

BOOKS OF ACCOMPT.

1. Inadmissible when entry made by a person not present at the delivery of the goods charged. *Harris* vs. *Caldwell*, ii., *133..... 434

2. Inadmissible to prove work done by a mechanic out of his shop. *White* vs. *St. Philips Church.*, ii., *306..... 543

BREACH OF WARRANTY.

1. Where there has been a breach of the warranty of title to a slave and the party purchasing has been deprived of the slave, by a paramount title, the measure of damages, for the breach of such warranty, is the price paid for the slave. *Glover* (*Assignee*) vs. *Hutson*, ii., *109.. 417

[The right of action is not taken away by payment to the warrantee of the price, which the slave, after having been taken from him, was sold for; but the *question* of recovery may be thereby diminished. *An*]

2. Where the unsoundness of a slave is known to a purchaser at public sale, he cannot maintain an action on the implied warranty of soundness.

3. Where the purchaser of a slave takes a bill of sale, or written warranty, and omits to insert a clause warranting the soundness, it is a reasonable inference that no warranty of soundness was intended. The presumption of warranty, however, is not conclusively rebutted, but it is a circumstance which should always be submitted or presented to the jury. *Porcher* vs. *Caldwell*, ii., *329..... 558

CARRIER. See *Trover*, 2, 3; *Private Ferry*, 1.

CITY COUNCIL OF CHARLESTON.

1. The City Council of Charleston have the right, under the constitution of this State, of passing an ordinance to prevent shop-keepers, (other than those licensed by the city,) from keeping any spirituous liquors, wines, &c., in their shops or in any adjacent room. *Heissembrittle* ads. *City Council*, ii., *233..... 498

CITY ORDINANCES.

1. To throw bales of cotton from the upper story of a cotton warehouse, (without the usual rope and tackle,) on any of the open spaces near such warehouses, where cotton is ordinarily exposed for sale, is a violation of the City Ordinance. *City Council of Charleston* vs. *Elford*, i., *234..... 152

2. The Town Council of Columbia, under the Act of Incorporation, have the power to enact by-laws, which shall be binding upon the persons and property, not only of the citizens of the town, but also of non-residents, when they come within the corporate limits of said town. *Kennedy* vs. *Sowden*, i., *323..... 210

COLLOQUIUM. See *Slander*, 5.

COMMISSIONER IN EQUITY.

Where a commissioner in equity, (upon the filing of a bill for injunction in his office) granted an order, that a writ of injunction should issue, upon the party's complying with the rule, by giving bond and approved security—and afterwards took a blank bond, or one that was informal, and informed the defendants to the equity proceedings, that he had taken a bond—whereupon, they were deceived as to its informality, and were never undeceived, until upon a trial at law upon said bond, they found it had been taken blank, and was therefore void. It was held, that the commissioner was liable upon his official bond, to the parties restrained and enjoined by his order, for the amount of the damages which they sustained, by reason of his laches and neglect. *The Treasurers* vs. *Clowney*, ii., *510..... 672

COMMISSIONER OF ROADS.

1. The Boards of Commissioners of roads represent the people of the district or parish for which they are appointed, and are clothed by law with a certain authority to act for the public. They are not, however, *a corporation*, and have no corporate funds; consequently they are exempt from private actions for neglect of duty. *McKenzie* vs. *Chovin*, i., *222..... 144

2. A single Commissioner is not liable for damages in a private action, for an injury which may have been the result of want of repairs in the roads, &c., in his particular section..... *Ib.*

COMMISSIONER OF SPECIAL BAIL.

1. Where an issue has been made up to try the validity of a debtor's schedule, and a day appointed by the commissioner of special bail, for that purpose, and the jury are in attendance—the question of postponement or continuance, becomes a question of discretion, to be addressed to the commissioner, who will never grant the motion, unless upon the most satisfactory showing.

2. A plaintiff will not be permitted to add new and other specifications, to his suggestions of fraud, &c., against a debtor's schedule, after the issue has been made up, and the parties are ready for trial.

3. The notes of the commissioner of special bail, taken on the examination of a debtor, applying for his discharge under the prison bounds' Act, on his previous application for discharge in the same

case, and before the specifications of fraud were filed, is inadmissible evidence to go to the jury, on trial of the validity of his schedule. *Bently* vs. *Page*, ii., *52 381

4. The Act of 1836, secures to creditors the right, either in person or by counsel to examine and cross-examine a party who is about to take the benefit of the prison bounds or insolvent debtors' Act, in the presence of the judge or commissioner of special bail, before whom he may be applying. And it is the privilege of such person's counsel, (seeking to take the benefit of either the prison bounds or insolvent debtors' Act,) to ask the defendant, when on his examination, such questions as he may think proper, in reply to such as have been propounded (and answered) by the adverse counsel.

5. Whenever the commissioner or judge permits a party to amend his schedule, after specifications have been filed, suggesting frauds, &c., it becomes a new schedule, and the creditor has the same right to examine the party, as to the amended part of the schedule, as he had to the original.

6. The notes of evidence of the commissioner of special bail, taken at a former application of a debtor for his discharge, under the prison bounds' Act, is not such evidence as should be read to the jury, on a subsequent trial, as to the validity of his schedule. Such testimony is incompetent. *Hyatt & Co.* vs. *Hill*, ii., *55 383

COMPANY.

1. A promise to pay the "Treasurer of the Abbeville Silk Company," is binding upon the subscribers to the stock of said company; and an action may be maintained against any subscriber who does not pay up his subscription, by any one who may be treasurer at the time the action is to be commenced. *Silk Company* vs. *Anderson*, i., *300 195

COMPARISON OF HANDWRITINGS.

1. Where there is conflicting testimony as to the genuineness of a signature, comparison of handwriting is admissible as confirmatory evidence, to enable the jury to decide upon which of the witnesses they could most confide. *Robertson & Co.* vs. *Millar*, i., *120 80

2. A bundle of notes that is admitted prove the genuineness of a signature, by comparison of handwriting, may be sent to the jury .... *Ib.*

CONSIDERATION.

1. The plaintiff lived with his father (defendant's intestate,) from 1828, up to the time of his death, in 1834, in the capacity of an overseer, for which he was to receive a certain portion of the crops annually. *Turner* vs. *Wallace*, i., *486 328

2. It appeared that he never received all of his share of the cotton crops before the death of defendant's intestate, and that his father acknowledged to one witness that he owed his son more than the value of a certain slave called Anthony, whom he intended the plaintiff should have, over and above his distributive share of his estate. Defendant's intestate made a will, but for want of proper attestation, it was not admitted to probate; in that he left the boy Anthony to plaintiff: *Held*, that there was a sufficient consideration to support the action of assumpsit, and the verdict of the jury for the plaintiff was sustained, and a new trial refused ..... *Ib.*

3. Defendant undertook, in writing, to pay the amount of a note, of one Groner, to the plaintiff, when he should be in possession of funds, belonging to Groner. *Held*, that an action could not be supported against the defendant, upon his undertaking; it being void for want of a consideration to support the promise. *Fort* vs. *Foster*, ii., *60 386

4. A note given in part as compensation, and partly to compromise

a prosecution for an assault and battery, is not void, the consideration being adequate to sustain the action. *Banks* vs. *Searles*, ii., *356.... 575

CONSTABLE.

1. A constable, in the discharge of an official duty, is not bound or required by law to look beyond the process which requires him to act. If the Court issuing the process has jurisdiction over the matter in which he is required to act, it is his duty to execute the process. He is neither permitted or required to look behind it to see if the Court has done its duty, and complied with all that the law requires as a prerequisite to the issuing of the process.

2. A ministerial officer, whose duty it is to execute a process, is justifiable under that process, unless it be void and not merely voidable. *Foster* vs. *Gantt*, ii., *335..... 562

CONSTITUTIONAL.

1. The first clause of the Act to raise supplies for the year 1839, which directs "that a tax shall be raised and paid into the Treasury of this State, of one-eighth of one per cent. upon all purchases and sales of bullion, specie, bank notes, bills of exchange, and stocks, which may be made by any brokers or agents in this State, for or on account of any bank, company or individual without the State; and also, upon all such purchases and sales as may be made by any such broker or agent upon his own account, or for account of others engaged in the same pursuits," held to be constitutional, but prospective in its words. *Burger, Tax Collector*, ads. *Carter, ex rela.*, i., *410..... 267

2. By the Tax Act of 1788, the fiscal year is considered as beginning on the first day of October preceding the enactment of the Tax Act..... *Ib.*

CONTRACT.

1. Where a party to a contract stipulates to perform one or more things, and in the event of non performance of any or all of them, agrees to pay a certain sum, the sum agreed to be paid will be regarded as a penalty, and not as liquidated damages. *Owens* vs. *Hodges*, i., *106..... 71

2. For the non-performance of a contract, the party failing shall pay the other for any loss he may have sustained, and this loss is the measure of damages. If this loss has been ascertained by the agreement of the parties, such agreement shall be carried into effect, otherwise the jury will assess the damages from a full view of the facts and circumstances of the case. See *Partnership*, 2..... *Ib.*

3. Where an overseer has been guilty of neglect, and some small departure from the terms of his contract, and these are known to his employer, and he is still continued as her overseer, it will be considered as a waiver of them, as grounds to rescind the contract. *Dillard* vs. *Wallace*, i., *480..... 323

CORONER.

1. It is a part of the official duties of a Coroner, to collect tax executions that are placed in his hands, where the Sheriff of the district is the tax collector; and his securities are liable for his neglect, or any default which he may make in not collecting them, &c. *The State* vs. *Irby, Adm'r.*, i., *485..... 327

COSTS.

1. The custom of postponing the payment of the Clerk's costs, until the termination of the suit, will be adhered to, as indicating the proper construction of the "*fee bill*" of 1839. *Hyans* vs. *Boyce*, i., *95..... 64

2. The sureties to a prison bounds' bond are not liable for the costs, incurred in defeating the discharge of their principal, on his applica-

tion under the prison bounds' Act. But costs may be taxed against the principal alone, in an issue to try the validity of his schedule. *Baker, Johnson & Co* vs. *Bushnell*, ii., *21..... 363

3. The sureties to a sheriff's bond are not liable for the costs, incurred in establishing a *nulla bona* return against their principal. *Leslie & Calhoun* vs. *Taggart et al.*, ii., *71..... 393

COURTS MARTIAL.

1. By the Act of 1833, courts martial have the power to try captains of patrol for neglect of duty as patrols, and impose the fine of twenty dollars, specified in the Act of 1819, for the non-performance of patrol duty, and no other court has cognizance of the matter. *Ex parte Biggers*, i., *69..... 45

2. Courts military, or courts martial, are a part of the law of the land, within the meaning of the constitution of *magna charta;* and form the most appropriate tribunal for all that class of offences which is created by the patrol laws, so inseparably connected with the laws regulating the militia..... *Ib.*

3. A captain of patrol failing to make a return, on oath, is guilty of neglect of duty, and may be returned to the Court as such..... *Ib.*

4. The Act of 1837, does not confer any new power, put is merely declaratory of the meaning of the Act of 1833. It is more explicit, but not more potential..... *Ib.*

COURT OF ORDINARY.

1. Where proceedings were instituted in the Court of Ordinary, for partition and sale of real estate, and the citation or summons issued by the Ordinary, with the probate of service and return, never has been recorded or returned to the Ordinary's office, parol evidence is admissible to prove its existence, &c., in an action of trespass *quare clausum fregit. Dowling et al.*, ads. *Hodge*, ii., *209..... 483

COVENANT.

1. In the construction of covenants, the intention of the parties must govern, where that intention can be ascertained from the instrument itself. Parol proof is not admissible to explain a deed of covenant, where there is no ambiguity. *Easterby* vs. *Heilbron*, i., *462..... 307

DEBTOR. See *Bills of Exchange, Notes and Bonds*, 5; *also Deed*, 2, 3.

DEBTORS' SCHEDULE. See *Commissioner of Special Bail*, 1, 2, 3; *Insolvent Debtors' and Prison Bounds' Acts.*

DEED.

1. A deed to a concubine to procure future cohabitation is void; also, a deed for services rendered by a kept mistress is void, if the grantor be in debt at the time of the conveyance, or continues to retain possession of the property from the date of the deed until he becomes insolvent. *Sherman & Debruhl* vs. *Barrett*, i., *147..... 97

2. Where a debtor had conveyed to his son-in-law a number of houses and lots in the town of Columbia, and a number of slaves, for which he is said to have received a large sum of money, and at the date of the conveyance was very much in debt; on the trial of the validity of his schedule, it was held that the *onus* lay on the defendant, to account for the proceeds of the sale of this property..... *Ib*

3. When a debtor alleges that the proceeds of a sale of property made by him, has been gambled away, the question of his gaming may be submitted to the jury, and their finding will not be disturbed..... *Ib.*

4. A deed executed by a debtor, with the view to defeat, delay, or hinder a creditor, is void. *Jones* vs. *Crawford*, i., *373..... 243

DEED OF GIFT.

Where a deed of gift from a parent to his daughter, (the plaintiff) of a negro, contained among other things, after appointing trustees, the following provisoes. "Provided always, and these presents are upon this special trust and confidence, and upon this express condition, that the said trustees, their executors, or administrators, shall and do permit and suffer me, the said G. De M. to use, keep and enjoy the profits of the said negro Ben, during my natural life, without paying or yielding any for the same or in any respect thereof. Provided also, that if I should remove the said negro Ben out of my possession, or the said negro should be removed out of my possession by any means whatsoever, then the use reserved shall terminate, and the said trustees, or either of them, shall take the negro Ben into their possession, and apply the profits arising from him to the use of my said daughter, until she arrives at the age of twenty-one years, or marries; at which time the said negro Ben to be delivered up to her, her heirs, executors, administrators or assigns."

It was held, 1. That the true construction of the deed was, that it was a conveyance to trustees for the use of G. De M. for life, with a condition forfeiting his estate if he should part with the possession of the slave, or any one should take him out of his possession; and in such case, the profits were to be applied to the use and benefit of plaintiff, until her marriage or full age; and if De M. should retain possession until his death, then the possession to be delivered to plaintiff.

2. That De Millen had a life estate in said negro, which might be the subject of bargain and sale under execution.

3. That the reservation of the use of the chattel to the grantor for life, made the whole deed fraudulent and void against creditors. *De Millen* vs. *McAlilley*, ii., *499..... 684

DEED OF ASSIGNMENT. See *Attorney*, 1, 2.

DEMURRER.

1. Where a general demurrer has been overruled, the adverse party have the right to enter up judgment on the matter in controversy, unless the demurring party obtain special leave to plead over at the time the demurrer is overruled. *Price* vs. *Price*, i., *291. (Vide, also, *Scire Facias*, 3.)..... 190

2. Where a sheriff has been sued on his official bond, and to the plea of performance, there is a replication, by plaintiff's assigning as a breach, "that the sheriff, during his term of office, (to wit,) on the 1st January, 1821, and on divers days between that day and the 25th January, 1817, had and received, for and on account of the plaintiff, &c., a large sum of money, to wit: the sum of two thousand three hundred and ninety-six dollars and ninety-two cents, and that the same was not paid over." To this replication, there were special demurrers. In the Appeal Court, the demurrers were overruled, and the replication was sustained. *Treasurers* vs. *Oswald et al.*, ii., *145. 443

3. Where there has been a general demurrer to a plea, and a joinder in demurrer, and the demurrer has been sustained, leave will not be given to plead over. *Moore, assignee*, vs. *Burbage*, ii., *168..... 457

4. In an action of debt, on a sheriff's bond, where the defendants pleaded performance, "and the breach assigned by the plaintiff was, that it was the duty of the sheriff to collect and pay over all tax executions, which might be lodged, and that on the first day of June, 1835, there were tax executions to the amount of one thousand seven hundred and thirty-nine dollars and seventy-eight cents lodged in his office, and that he did not collect and pay them over." To the plea of performance, there was a replication by the plaintiff, and the defend-

ants demurred specially, for the cause that the tax executions making the aggregate, were not specified. The demurrer was sustained, and the Appeal Court refused to reverse the decision. *The Treasurer* vs. *Rives, sheriff*, ii., *207 482

DEVISE.

1. Where a testator, by his last will, devised certain real estate to the plaintiffs, as trustees for his daughter, (therein named,) reserving the "sawing timber," growing thereon. It was held to be a good reservation, and sufficiently explicit to be understood. *Terrell, et al.*, vs. *Easterling*, ii., *24 365

2. Where a testator by his last will, used the term (in relation to a bequest of slaves,) "I will and bequeath Sarah, *and all her increase*,"—the term all her increase, was held to refer only to such children of the slave Sarah as were born after the making the will. *Donald* vs. *Dendey*, ii. *123 427

DISCONTINUANCE. See *Variance*, 1, 2.

DISCOUNT.

1. Discount cannot be offered in evidence under the general issue, or considered as payment; and the defendant cannot be permitted, without notice, to avail himself of a separate cause of action, which the plaintiff cannot be prepared to resist. *Buee* vs. *Henagan*, i., *28. 18

2. Where the plaintiff's demand has been reduced by a discount below the *sum. pro.* jurisdiction, the practice is to give a decree for the balance. *Owners of Steam Boat St. Matthews* vs. *Mordecai*, i., *294 192

DISTRESS WARRANT. See *Landlord and Tenant*, 2.

1. Goods distrained by a landlord for rent in arrear, and replevied by the tenant, (although they may be removed to other premises) are liable first to the *lien* of the *Retorno habendo cum fi. fa. Harris, Adm'r*, vs. *Clayton*, i., *194 127

2. The lien of a distress warrant upon goods replevied, is never lost; neither does it give place to any other. The sale of the goods is merely suspended, in order to try the question whether the rent is truly in arrear ..... *Ib.*

DOCKET.

I. These were actions of debt, on the official bond of Easterling, deceased, late sheriff of Georgetown district. The writs were issued to Spring Term, 1836, and the actions were prosecuted for the benefit of one Taylor of New York. On the 20th April, 1836, after the commencement of these suits, C. & C., who were judgment creditors of Easterling, filed a bill in the Court of Equity for Georgetown district, against his executor for an account. On the 27th of the same month, the Court made an order for the creditors to file statements of their claims, on oath, by the 1st January, 1837, with the Commissioner; and another order, enjoining them from proceeding at law against the executor. The time for filing claims was afterwards extended to January, 1838. In January, 1838, the Commissioner made a report of claims which had been filed in his office against Easterling, in his official capacity only; and the Court thereupon made a decree, that the sureties pay the amount of said claims to the Commissioner, and that execution issue against them accordingly; and further, that the creditors of the sheriff, who had failed to file their claims, be perpetually enjoined from pursuing the same against the sureties. Taylor's claim was not filed in the Commissioner's office, and, at Fall Term, 1838, these cases, which had been on the writs of inquiry docket, since Fall Term, 1836, were struck off. Notice was afterwards given to the defendants, that a motion would be made to restore them;

and at Spring Term, 1838, such a motion was made and affidavits offered on both sides. After hearing counsel, the Court made an order to restore them to the docket. The defendants gave notice of an appeal from this order, but did not prosecute it. On the call of these cases for trial, at Spring Term, 1840, the defendants again moved to strike them from the docket, and his Honor Judge Evans, presiding, granted the motion. *Held*, that it was an improper order in the Court below, and the cases were ordered to be restored to the docket. *The State of South Carolina* vs. *Waterman et al.*, ii., *205.... 480

DOMESTIC ATTACHMENT.

1. If the proceedings of a justice, from whom a writ of Domestic Attachment issued, shows upon its face, that the justice had no authority to grant the attachment, or if it fail to show that he had, then no judgment could be given upon it, either by himself or the Circuit Court, but the whole is an absolute nullity; and it is of no consequence in what way the defect is brought to the view of the Court, or at whose motion it is quashed. *Devall* vs. *Taylor*, i., *460. 306

DOWER.

1. Want of notice, is no ground to oppose the confirmation of the return of the Commissioners to a writ of Admeasurement of Dower. Where the return is perfect, and exactly in conformance with legal rules, and is verified by the oath of all the Commissioners, it is entitled to full credit, rather than the ex parte affidavit of two of them. *Beaty* vs. *Hearst*, i., 31..... 20

2. Widow's claim of dower extends to all the lands of which her husband was seized during coverture: and the alienation of the husband, during his life, is an immaterial circumstance, as to her right of dower. The very definition of dower, of course embraces the whole right, whether in lands aliened or in those of which the husband died possessed.

3 The acceptance of the provisions under the statute, by a widow, is a legal bar to her rights of dower; and such acceptance may be pleaded at law as a defence to the demand of dower.

4. Where a widow is found purchasing part of the real estate of her deceased husband, joining with the other heirs at law in the title deeds for other portions of the land, and receiving part of the money for which the land was sold, these are such circumstances as go to show her election and acceptance of the statutory provision of dower; and where the question of election has been fairly submitted, (under the circumstances,) to the jury, and they have decided, the Court will not disturb their finding. *Avant* vs. *Robertson*, ii., *215.....

DUELLING.

1. Any agreement to fight with loaded pistols, and actually fighting in pursuance, constitutes a duel under the Act. And it does not depend upon the time when the agreement was made, but upon the fact of the agreement. *Heriott & Patterson* ads. *The State*, i., *126... 83

2. The circumstances attending a fighting with pistols, and the intention of the parties, are questions of fact to be left to the jury.... *Ib.*

ELECTION.

1. It is no ground to arrest the election of a Sheriff, and to eject from office, because the election at one of the polls in the district was managed by one manager, assisted by another appointed by the Senator, under the Act of 1828, p. 39, without any objection being made to the appointment on the part of the representatives. *The State ex rel. Donaldson* vs. *Townsend*, i., *495..... 336

EVICTION.

1. In case of eviction, by title paramount, the measure of damages is the price paid for the land, with interest. *Pearson* vs. *Davis*, i., *37..... 24

2. Consequential damages cannot be recovered for any inconvenience or loss which the vendee may sustain in his improvements, however expensive or permanent. (*The case of Henning, Ex'or*, vs. *Withers*, (3 *Brev. Rep.* 458,) *considered and confirmed.*)..... *Ib.*

EVIDENCE. See *Trespass to try Title*, 8, 10, 11, 12; *Trespass* 4, 5.

1. Parol evidence is inadmissible to explain a written contract, or to vary it, unless where there is ambiguity. *King & Co.* vs. *Colding*, i., *133..... 88

2. The docket of the Court in the *sum. pro.* jurisdiction, with this entry: "*Alex. Gregg* vs. *R. J. Gregg—Decree for Plaintiff*," is not such evidence of a judgment, as will enable a purchaser of land at sheriff's sale, to recover in an action of trespass to try titles. *Evans* vs. *Hinds*, i., *490..... 332

3. The declarations of a tenant, after he has aliened his right and interest in the land, is inadmissible evidence to prove where a line ran, or where a tree stood. *Felder* vs. *Bonnett*, ii., *44..... 376

4. Parol evidence is only admissible to explain a latent ambiguity. If a testator devise his estate to a person, or class of persons, by name or description, and it should turn out that there is no person of the name, or that will answer the description, parol testimony may be introduced, to explain to whom the testator intended the bequest to be applied; for there is a latent ambiguity, which, if unexplained, would render the will inoperative. Whatever is necessary to explain the ambiguity of the legatee, is equally applicable to an ambiguity in the description of the legacy itself. *Donald* vs. *Dendy*, ii., *123..... 427

5. Where a shop-keeper, himself, sold and delivered goods to a party and during the same day, the entries were made by another person, who occasionally acted as clerk for him, it was held, that the book was no evidence of the debt, and that the evidence was inadmissible. *Vide Hurts* vs. *Neufville in a note, S. P. Harris* vs *Caldwell*, ii., *133. 434

6. In an action for assault and battery, the preceding words or imputations of the same kind as those which immediately led to the assault, if previously communicated to the defendant, may be offered in evidence, by way of mitigation of damages.

7. The inducement to the transaction, and all such particulars, in the conduct of either party, leading to the final act, or forming part of it, as seemed to show in what degree blame attached to them severally; and such acts as would aid the jury in determining the just measure of damages, would be admissible evidence. *Dean* vs. *Horton*, ii., 147... 444

8. Where an unauthorized inquiry has been instituted in the Court of Chancery, and so declared by the Court itself, the deposition of a witness who deposed in the chancery case, and who has since died, will not be received by a Court of law in a subsequent cause between the same parties. *Com'r in Equity Mc Whorter*, ii., 254..... 510

9. The books of a tradesman or mechanic are admissible in evidence only to prove the performance and delivery of the work done within the mechanic's shop. Where the work is done outside of his shop, or on the premises of the party charged, such as building or repairing a house, or any other fixtures, there can be no necessity for books, for the work is apparent and palpable. *St. Philip's Church*, ads. *White*, ii., *306..... 543

EXECUTION.

1. Where there are several executions in the sheriff's office against

the same defendant, of different dates, the defendant may, on paying money to the sheriff, direct its application, and the sheriff, on rule, will be protected. *Adams* vs. *Crimager*, i., 309..... 201

2. A receipt from the Sheriff, when money has been paid on a junior execution, is a discharge to the defendant *pro tanto* on the execution. *Ib.*

3. The sheriff sold a tract of land under execution, which was purchased by a third person, against whom the owner subsequently filed a bill in chancery, to set aside the sale, on the ground that the execution was satisfied. The Chancellor, upon examining the case, thought the fact of satisfaction was proved, and that the purchase showed it; he, however, referred it to the commissioner, to inquire as to that fact, and decreed, if found for the complainant, that the sale and deed should be set aside; otherwise, that it should stand. Subsequently, the parties compromised, and the purchaser's money and costs were refunded, and he, by the direction of the owner, J. T. McJunkin, conveyed the land to J. A. McJunkin. It was held,

That the Chancellor's decree was provisional.

That the sheriff's sale and deed still subsisted.

That the legal title was still in the alienee of J. A. McJunkin. *Gist et al.* vs. *McJunkin et al.*, i., *342..... 223

4. That a sheriff's sale, under an execution purporting to be satisfied, when the sheriff has in his office, at the time of the sale, a subsisting execution, is not void; and the plaintiff in the subsisting execution is not entitled to have the land re-sold, but is only entitled to the proceeds arising out of the sale..... *Ib.*

EXECUTION, OR MESNE PROCESS. See *Prisoner*, 1.

EXECUTORS AND ADMINISTRATORS.

1. In a suit against the securities of an administrator upon their bond, where a decree of the Ordinary against the administrator is offered in evidence, it is competent for the securities to show that the administrator, at the time of the decree, had removed from this State and was resident in another; and therefore was not subject to the jurisdiction of the Court. *Buckner, Ordinary*, vs. *Archer et al.*, i., *85 57

2. In such case, it is not competent for the Ordinary to make the absent administrator a party by publication in the Gazette, and the the securities may show that the Ordinary proceeded in that form, although the decree recites that the administrator was duly cited and made default. Such recital is not conclusive. See *Lesterjette, Ordinary*, vs. *The Ex'ors of Ford*, in note..... *Ib.*

3. A decree in the Court of Equity against an administrator, with the return of "*nulla bona*" on the *fi. fa.*, (issued on the decree,) is *prima facie* evidence against the surety on the administration bond; and it is not necessary after such proceedings to have a decree of the Court of Ordinary before commencing actions on the bond. *Ordinary* vs. *Carlisle*, i., *100..... 67

4. A surety of an administratrix, (whose intestate was the administratrix of an estate in her lifetime,) is not absolutely bound by a decree in the Court of Equity against his principal, for the *devastavit* committed on the estate of which his principal's intestate was the administratrix, where he was not made a party to the proceedings; and he is not concluded from showing that his principal received nothing of the assets with which she is charged..... *Ib.*

5. The sureties to an administration bond are not liable to the heirs at law for the rent of land belonging to the estate of which their principal was the administrator under special circumstances. *Allen, Ordinary*, vs. *Bruton & Hartlee*, i., *249..... 162

FEE BILL.

1. By the fee bill of 1840, the ten times the excess which the officer is made liable to forfeit to the party injured, is "to be recovered by suit in the Court of Common Pleas, in which no imparlance shall be allowed; or by rule in the case of sheriffs, or by *sum. pro.* in the cases of Magistrates and Constables, where the penalty may not exceed $20." By the fee bill of 1839, (of which that of 1840 is amendatory, so far as relates to sheriff,) the ten times the excess is to be recovered by suit in the Court of Common Pleas, in which no imparlance shall be allowed, or by rule when the penalty may not exceed twenty dollars. Putting these two Acts together—it was held, that the qualification in the Act of 1840, when the penalty may not exceed $20, as applying to the rule in the case of sheriffs, and to the *sum. pro.* in the case of Magistrates and Constables. *Ross, Sheriff,* ads. *Gavin et al.,* ii., *275..... 524

FEME COVERT.

1. A feme covert cannot be made a feme sole carrier under the custom, or under the Acts of the Legislature of 1823 and '24. *Ewart* vs. *Nagel,* i., *50..... 32

2. The privilege of a feme sole trader does not reach beyond buying and selling merchandise. (*S. P.* 1 Hill, 429)..... *Ib.*

3. The will of a feme covert is void at law, and the Court of Common Pleas, acting as a Court of Appeals from the Ordinary, cannot entertain the question of executing a will under a deed of settlement. This is a question purely for the Court of Equity. *Shaw* vs. *Dawsey,* i., *247..... 161

FEIGNED ISSUE. See *Garnishee,* 4, 5.

FORFEITURE.

1. After a Bank has suspended specie payments, its charter (in contemplation of law,) is forfeited; but where, after its charter was thus forfeited, it continued to exist *de facto,* and exercised all the privileges and immunities previously granted by the Legislature, and the Legislature afterwards by subsequent legislation, declared that the corporation shall exist. It was held to be a waiver by the State of previous forfeiture. *The State* vs. *The Bank of Charleston,* ii., *439.. 627

FORGERY.

1. The words *warrant and order,* in an indictment for forgery, describing the instrument forged, are synonymous with *warrant or order. The State* vs. *Jones,* i., *236..... 153

2. An instrument signed by a party, is, in legal parlance, the paper writing of such party. It is his signature which gives it that character, and not the body of the instrument..... *Ib.*

3. Every indictment for forgery must set forth the instrument charged as fictitious, in words and figures, so that the Court may be able to judge from the record, whether it is an instrument in respect of which forgery can be committed..... *Ib.*

4. If an indictment charges the forgery to be with intent to defraud an incorporated bank, and its corporate name is set forth, it is sufficient if it appears to be an incorporate bank within this State..... *Ib.*

5. The cashier is a mere officer representing the bank, and a check drawn upon him as such is drawn upon the bank; therefore, a fraud committed on him, is a fraud upon the bank..... *Ib.*

6. The same indictment set forth that the paper writing, alleged to be forged, purported to be a warrant and order for the payment of money, and to have been drawn by one Tristram Tupper. It then set out the instrument in *hæc verba,* from which it appeared that it was

signed T. Tupper, and averred that the prisoner made it with the intention to defraud Tristram Tupper: *Held*, that there was no variance, and that the count was well framed..... 153

7. If an instrument from its face purports to have been made in Charleston, S. C., and it is proved the prisoner at its date was there, and had the same in his possession, it is sufficient evidence to show that it was made there..... *Ib.*

8. If a prisoner is guilty in fact of forgery, his conviction may be sustained, either under the Acts of 1736–7, the Act of 1801, or at common law..... *Ib.*

FRAUDS AND STATUTE OF FRAUDS.

1. The parol undertaking of a third person to pay for articles purchased by another, is void, by the *Statute of Frauds*. *Richardson* vs. *Richardson*, i., *280..... 183

GARNISHEE.

1. To enable a garnishee in attachment to retain the goods in his hands, it is not necessary that he should prove himself to be a creditor entitled to bring an action; it is enough if he establishes a lien, even for outstanding liabilities incurred for the defendant, and absent debtor, which creates a special property, until discharged, and overreaches the claim of the attaching creditor. *Bank of the State* vs. *Levy*, i., *431..... 283

2. An agent here, who, for a commission, negotiates exchanges for a house in New York, who buys bills on Europe for them, and to raise the funds for that purpose, draws and sells bills upon them at home for corresponding amounts, some of which they accept, and others do not, and the bills are protested, such agent, on the failure of the principal house, has a lien on any funds or securities which come to his hands for his principals, to secure himself against these outstanding liabilities, although in fact he may not have paid any of the bills..... *Ib.*

3. And there is no difference between bills accepted and not paid, and bills not accepted. The lien extends to all equally. Nor does it make any difference, that the funds and securities come to hand after the liability is incurred, and therefore were not looked to as an indemnity at the time..... *Ib.*

4. The right of property in goods attached, if claimed by the garnishee, or by another, may be tried in the form of a feigned issue, wherein the garnishee or other claimant is plaintiff, as well as in any other form. *Goldthwaite & Evans* vs. *Bryant*, i., *451..... 299

5. Where a third person, not served as a garnishee, lays claim to the goods attached, and is allowed to come in with the privilege of a garnishee, and to make up a feigned issue as plaintiff, to try the right of property, whereby he gains possession of the goods, if he afterwards discontinue, and withdraw the record, he cannot then require a suggestion to be filed by the plaintiff in attachment, who is entitled to judgment against him as a defaulting garnishee..... *Ib.*

GUARANTY, See *Bills of Exchange, Notes and Bonds*, 4.

GOAL FEES. See *Prisoner*, 1.

HAWKERS AND PEDLARS.

1. Books were sent up from Charleston to Columbia, and consigned to Polock, Solomon & Co., merchants and auctioneers in Columbia, by whom the freight from Charleston was paid, and sold by them, and the defendant, at auction and at private sale, for the use and benefit of the defendant: *Held*, not to come within the purview of the Act of Assembly for Hawking and Peddling. *The State* vs. *Belcher*, i., *40. 25

2. A hawker and pedlar is one who travels from town to town, or

from plantation to plantation, carrying to sell, or exposing to sale, goods, wares and merchandise; but a single shipment of goods, regularly consigned to Polock, Solomon & Co., by the defendant, and sold by himself or them, for his use and benefit, is not hawking and peddling within the meaning of the Act..... 25

3. The defendent, a non-resident of this State, did sell goods, wares and merchandise, in a house in the town of Columbia, and is therefore, when properly indicted and convicted, liable to the penalties of the Act of Assembly of 1835, page 6. (Per O'Neall, J.)..... *Ib.*

HOLDER.

1. Holder is a word of the same import as bearer, and both may acquire a title by lawful delivery according to the terms of the contract. *Putnam* vs. *Crymes & Owings*, i., *9..... 6

HUSBAND AND WIFE. See *Bailee*, 3.

1. Where an action of assumpsit is brought in the name of husband and wife jointly, and the declaration alleges the promise to have been made jointly without stating what interest the wife had, or any reason is shown why she should have been joined, it is such a defect as cannot be cured by the verdict, and which is fatal upon a motion in arrest of judgment. (1 Chitty. Pl. 20; 2 Wm. Bl. 1236; 2 Caines' Rep. 221; 2 Burr. 279.) *Creiger et ux.* ads. *Smith*, ii., *140, 279..... 526

IMPLIED WARRANTY. See *Breach of Warranty*, 2, 3.

INCORPORATIONS. See *City Ordinances*, 2.

INDEMNITY. See *Indorser*, 2.

INDICTMENT.

1. It is not necessary, in an indictment under the Act of 1754, (P. L. 335-6,) for aiding a slave in running away and departing from his master's employment, to set out and aver the means used in aiding the slave to run away. It is sufficient, for all purposes, if the indictment charge the offence in the words of the Act. It must definitely and directly charge the defendant with aiding the slave in running away, so that his master has been deprived of his services; the name of the slave, and the name of his master; the time and place, &c. *State* vs. *Blease*, i., *472..... 316

2. In an indictment for inveigling, &c., Edmond, the slave of L. J. Cross, it was held not necessary to allege that L. J. C. was the owner or employer of the said slave. It is sufficient if the charge is laid "one negro slave of L. J. C." *The State* vs. *La Creux*, i., *488..... 330

3. The material words of the statute under which an indictment is framed, must be used..... *Ib.*

4. It is not necessary to allege in an indictment, by what means or how the prisoner aided the slave in departing from the service of his master..... *Ib.*

5. Any trading with a slave, without a permit from his owner or employer, in buying or selling, for cash or on credit, for much or for little, is an indictable offence under the Act of 1817. *State* vs. *Claus Vonglon, Jr.*, i., *187..... 123

6. A count for felony, and a count for a misdemeanor, may legally be joined in the same indictment. *The State* vs. *Boise & Stuke*, i., *189..... 124

7. Where two persons were jointly indicted for receiving stolen goods, and one of them was acquitted, the acquittal of one does not operate as a discharge to the other. *Boies & Stuke* ads. *The State*, ii., *252..... 509

8. Wherever one of the counts in an indictment for trading with a

slave is good, the Court awards judgment upon it, notwithstanding the other counts may be bad. *The State* vs. *Turner*, ii., *399..... 601

Vide, *also Forgery*, 1, 2, 3, 4, 5, 6, 7, 8, *and Bastardy*, 1.

INDORSER.

1. The protest of a note for non-payment, and legal notice to the endorsor, binds the endorser for the payment of the debt. *State Bank* vs. *J. C. Kerr*, i., *139..... 91

2. "The surety is bound by the terms of his contract, and if the "creditor, by *agreement* with the principal debtor, without the concur- "rence of the surety, varies these terms, by enlarging the time of "performance, the surety is discharged; for he is injured and his risk "increased."..... *Ib.*

3. Where a new contract had been made by the defendant, Kerr, with the bank, (which he never complied with,) by which he was to have five years, by substituting new notes wth the same endorsers, in lieu of the suit; it was held not to be such a variance as to discharge the endorsers..... *Ib.*

4. Whese there is a special endorsement on a note, waiving the right to the usual notice of demand and refusal; unless the endorsement is written by the endorser, its truth and correctness must be clearly proved to have come from his authority, or it cannot avail the endorsee *Fowler* vs. *Fleming*, i., *282..... 184

5. Where the endorser of a promisory note has secured himself against his liability, by an assignment or lien upon the whole, or a sufficiency of the maker's property as an indemnity, notice is not required to be given to him. *Barrett* ads. *Charleston Bank*, ii., *191. 471

INFANCY.

1. Where a daughter (an infant) resides with her mother, before marriage, it will be presumed that she was properly maintained, until the contrary is proved; for the mother is considered to be the proper judge of what is necessary for her, and should be consulted before a credit is given to her. *Vide Connolly* ads. *Assignees of Hull*, 3 McC. Rep. 6; *Jones & Danforth* vs. *Colwin and wife*, i., *14..... 9

INJUNCTION. See *Docket*, 1.

[It is a contempt of the Court of Equity, for a plaintiff at law, whose process has been enjoined, to proceed thereon after the error for injunction, and before the writ of injunction, if he has notice of the error. *Treasurers* vs. *Clowney*, 510. *An.*]

INSOLVENT DEBTORS' AND PRISON BOUNDS' ACTS.

1. Before requiring a defendant, who applies for his discharge under the *Insolvent Debtors' Act*, to join in an issue to try the fairness of his schedule, there ought to be some showing by affidavits; but if the plaintiff, without affidavit, makes the charge by suggestion, and the defendant pleads, he waives his right to call for affidavits; he admits by his plea that there is something to be tried by a jury. *Baker, Johnson & Co.* vs. *Bushnell*, i., *66..... 43

2. An applicant for his discharge under the Insolvent Debtors' Act, will not be permitted to discontinue or withdraw his application after a suggestion charging his schedule with fraud has been filed. *Sherman & Debruhl* vs. *Barrett*, i., *147..... 96

3. A defendant's schedule is amendable, under the discretion of the Court; but it must be shown by affidavit, or otherwise, to the satisfaction of the Court, that the omission to insert the property omitted in the schedule, arose from ignorance, inadvertance, or mistake. He will not be permitted to amend, if it will create surprise or delay to the other party..... *Ib*

4. Whenever the right of a person to be discharged is resisted, on the ground of fraud, it is not necessary that there should be any showing on oath, unless the result of the allegation would be to delay the hearing of the debtor's application. In that event, the Court, in the exercise of a sound discretion, may require the creditor to verify his accusation by affidavits..... 96

5. The limitation of time in the 7th section of the Prison Bounds' Act, (P. L. 457,) applies solely to undue preference; and a fraudulent sale or conveyance, and a fraudulent preference, are two distinct things..... *Ib.*

6. A witness attending under a subpœna *duces tecum*, is not required to testify, but merely to bring into Court a paper which the party needs..... *Ib.*

7. Where an applicant for the Insolvent Debtors' Act has been discharged by order of the Circuit Court, and the order for his discharge has been set aside by the Appeal Court, the rights that he acquired by the order ceased and determined when it was reversed by the Appeal Court. *Baker, Johnson & Co.* vs. *Bushnell*, i., *272..... 178

8. Every prisoner in execution is entitled to the prison bounds, on his giving to the sheriff security to remain within them, and to render a schedule on oath within forty days; provided, if he intends to take the benefit of the Insolvent Debtors' Act, passed in 1759, he or she has not been in actual confinement forty days.

9. Whenever the prisoner intends to take the benefit of either of the said Acts, if he has the privilege of the bounds, he must, according to his bond, render a schedule on oath.

10. Where the prisoner renders in a schedule on oath, of his whole estate, he has the right to apply for a discharge under either of the said Acts. If he applies for a discharge under the Act of 1788, he need file no petition, but the *clerk* is required within ten days after receipt of the schedule, to give notice that the prisoner will be discharged, and the schedule assigned, unless satisfactory cause to the contrary be shown before one or more judges of the Court from whence the process originates, or one of the Commissioners of special bail.

11. It is the duty of the clerk to give the notice, and it must be done within ten days after the filing of the schedule; but the notice must be given on the application of the prisoner. He must elect, and not the clerk. The Insolvent Debtors' Act requires the application to be made by petition; the other Acts require no petition. *Muldrow, Assignee*, vs. *Bacot et al.*, ii., *359..... 577

INSURANCE COMPANY.

1. A party insuring goods, &c., with an insurance company, is not obliged to demand payment of the contributors, before bringing suit against the insurers. *Faulkner & Rogers* vs. *Augusta Insurance Company*, ii., *158..... 450

2. Where a party obtained from two different Insurance Companies a policy of insurance for the same stock of goods; and by one policy, (to wit,) the one obtained from the defendants, it was expressly stipulated, "that in case the buildings or goods herein mentioned, have been already, or shall be hereafter insured by any policy issued from this office, or by any agent for this office, or by any other Insurance Company, or by any private insurers, such other insurance must be made known to this office, and mentioned in or indorsed on this policy *otherwise* this policy to be void." *Held*, first, that the question of whether the stock of goods described in this policy was the same as those described and covered by the policy in the Charleston Insurance

Company, was a question properly for the jury, and their finding will not be disturbed.

Secondly, it was held, that the policy of insurance obtained from the defendants was void by the terms of the policy. It having been obtained by fraud and misrepresentation. *Neve* vs. *Columbia Insurance Company*, ii., *220..... 490

3. An Insurance and Trust Company have the right on a trial upon a policy of insurance, to insist and demand the production of the preliminary proof as a condition precedent to the plaintiff's recovery. But they may, nevertheless, have waived their right to call for such evidence by some act on their part, when the policy was presented for payment.

4. What is or is not a waiver of the preliminary proof, must depend on the circumstances and language used at the time.

5. Where a party took a policy of insurance from an Insurance and Trust Company, upon liquors, groceries, &c., and the same day on which the policy was executed, permission was given by them to assign the policy to a third person, it was held, that the party to whom the assignment was made was entitled to recover, to the amount of the interest which he had in the policy, notwithstanding the party to whom the policy was granted, had deprived himself of his right to recover by acts of fraud.

6. The plaintiff placing the policy in the hands of a third party to "assure" him, by consent of the underwriters, gave to (Khonke) the third party only an equitable interest, but such an interest as a Court of law will recognize for the purpose of doing justice in a legal proceeding. *Neve* vs. *Colombia Insurance Company*, ii., *237..... 500

INTEREST. See *Bills of Exchange, Notes, &c.*, 10.

JOINT CONTRACTORS. See *Statute of Limitations*, 14.

JOINT TRESPASSERS.

1. In an action of trespass and assault and battery, where the battery has been committed by several, and a recovery had against one, such recovery may be pleaded in bar to an action for the same battery brought against another. *Smith* vs. *Singleton*, ii., *184..... 467

JUDGE. See *Slander*, 6. *Trespass to try Title*, 12.

JUDGMENT.

1 A Court of law has the power to vacate or set aside its own judgments, when obtained by or founded in fraud. *Dial & Henderson* vs. *Farrow*, i., *292..... 191

2. The proper course to pursue, where a judgment is sought to be vacated, and affidavits are submitted by the defendant, is to take out a rule for the plaintiff, returnable to the next term of the Court, to show cause why the judgment should not be set aside..... *Ib.*

3. The judgment under which the land is sold, at sheriff's sale, becomes a part of the title of the purchaser. *Jones* vs. *Crawford*, i., *373..... 243

JURISDICTION.

1. In bringing an action in the sum. pro. jurisdiction, to recover the penalty of $50, under the Act of 1839, for the unlawful beating of a slave, it is not necessary that the plaintiff should aver in his process that the defendant was a white man. *Caldwell, et al.* vs. *Langford*, i., *275..... 180

2. Strictness of pleading is not required in the summary process jurisdiction..... *Ib.*

JURY. *Larceny*, 4.

JUSTICES.

1. Where two Justices, under the Habeas Corpus Act, had admitted a person to bail, who was charged with murder in the warrant, it was held that they were guilty of an escape, and might very properly be indicted. *The State* vs. *Arthur & Guignard*, i., *456..... 303

KILLING A SLAVE. See *Railroad Company*, 2.

LANDLORD AND TENANT.

1. The wife of a tenant is a competent witness between the landlord and a third person. *Seigling* vs. *Main*, i., *252..... 164

2. Where the agent of a landlord under his own hand and seal, issued a distress warrant against the goods of the tenant, and constituted a third party as bailiff to levy the warrant, it was held competent for the landlord to come in and substitute himself for the agent on the record, and avow for rent in arrear. *Keckly* ads. *Harris, Administrator*, ii., *196..... 474

LARCENY.

1. The defendant was a common carrier, owned a boat on the Santee, and undertook to transport cotton from Orangeburg district to Charleston, belonging to various persons. Before reaching Charleston, and while passing down the river, he communicated his intention (to one of the hands on board,) of converting the cotton to his own use. Afterwards at "*Euchaw Creek*," in Charleston district, he consummated his previous intention, by burning a portion of the cotton and disfiguring the marks upon the other bales by patching, and had the cotton shipped on board a steamer to Charleston, and sold and appropriated the sales to his own use. Upon an indictment for grand larceny in Orangeburg district, the jury were charged by the Court:

First, "That to convict the prisoner of larceny, there must be a taking and carrying away of the goods laid in the indictment, with a felonious intent, in the *District of Orangeburg*." "Second, That when the prisoner received the goods, if he intended to deliver them in good faith to the consignee in Charleston, then his subsequent fraudulent appropriation of them to his own use could not make him guilty of larceny." Third, If, when the goods were delivered to him, he received them with the intention of stealing them—then it was larceny from the beginning, as laid in Orangeburg District."

2. The prisoner was found guilty under this charge, of petit larceny. And the Appeal Court *held*, upon appeal, among other things—

1st. That the jury under the circumstances, were at liberty to infer that the defendant, at the time he received the cotton in Orangeburg, intended to steal it and convert it to his own use, and the verdict of guilty was very properly given.

2nd. That the cotton so stolen by the defendant belonged to three different individuals, and he was very properly indicted in three cases, and a conviction in one case was no bar to a conviction in the two others. The stealing of the goods of different persons is always a distinct larceny. *The State* vs. *Thurston*, ii., *382..... 591

3. Where the prisoner found a sum of money on the highway, which he soon after converted to his own use, with various circumstances of fraud and concealment: it was *held*, "That if the prisoner at the time of finding the pocket book, and before he removed the money, knew it to be the property of the prosecutor," the conversion under these circumstances would be larceny. *The State* vs. *Ferguson*, ii., *502..... 666

LIEN. See *Garnishee*, 2, 3.

LEVY.

1. A levy upon sufficient personal property is *prima facie* evidence of satisfaction.

2. Where personal property had been levied on (ten years before,) of the defendants, and by the direction of the plaintiffs the sheriff did not advertise and sell, the plaintiffs will not be permitted to claim money arising from other sales of the defendant's property under junior executions. Their lien upon other property of the defendant is suspended until the first levy is disposed of and found insufficient. Neither can it be restored by their own act in releasing the levy, after the levy and sale under the junior execution. *Moore & Nesbit* vs. *Kelly*, ii., *350..... 572

LOCATION. See *Trespass to try Title*, 4, 5, 6.

MALICIOUS PROSECUTION.

1. Where a prosecution against a party never legally existed, he cannot maintain an action for malicious prosecution. *Braveboy* ads. *Cockfield*, ii., *270..... 521

MECHANICS' BOOKS. See *Evidence*, 9.

MINISTERIAL OFFICER. See *Constable*, 2.

NEW TRIAL. See *Slander*, 5. *Verdict*, 2.

1. Where the injury to a horse, (which has been found within the enclosure of another,) appears rather the result of accident than design, and a decree for the plaintiff, for the injury, has been given—a new trial will be granted. *Jones* ads. *Self*, i., *12..... 8

2. Where a trespass for beating a slave has been clearly proved, without any legal justification, and the jury find a verdict for the defendant, a new trial will be granted. *Grimke* vs. *Houseman*, i., *131.. 86

3. The confession of a clerk, in the absence of his employer, that he had sold wine to a servant girl, is not evidence to charge the employer; and a new trial will be granted to the absent defendant, without prejudice, *The State* vs. *Boise & Stuke*, i., *191..... 125

NONSUIT.

1. The rule of Court which provides that a plaintiff who does not proceed to trial on the fourth call of the cause, or obtain a continuance, shall be nonsuited, is not only within the power of the Court, but is expedient and proper, and ought to be enforced. *Munro* vs. *Laurens*, i., *442..... 291

2. In such case, where a nonsuit has been ordered, or the cause has been struck off the docket, the Court will not set aside the nonsuit, or restore the cause, at a subsequent term, on the affidavit of the plaintiff, that he was misled by the Clerk's order for judgment by default, and supposed that final judgment had been obtained, although his attorney may have died in the meantime..... *Ib.*

NOTE. See *Consideration*, 4.

NUISANCE.

1. All roads laid out by *public authority* must be regarded as public roads, in the obstruction of which a nuisance may be committed. *The State* vs. *Mobley*, i., *44..... 28

2. A road laid out by order of the County Court of Chester District is a public road, unless discontinued by order of the Commissioners of Roads, or become extinct from long neglect or non user... *Ib.*

ORDINARY. See *Court of Ordinary*.

OVERSEER. See *Contract*, 3.

PAROL EVIDENCE. See *Evidence. Court of Ordinary.*

PAROL GIFTS.

It is now the settled law of the land, that a voluntary conveyance of a personal chattel, is good against a subsequent purchaser with notice, where there is no fraud in the gift.

2. The Act of the Legislature passed in 1832, on the subject of parol gifts, was never intended to do more than prescribe a rule to govern future cases. Its application could not extend to gifts created before its passage. *Moultrie* vs. *Jennings*, ii., *508..... 670

PARTITION. See *Court of Ordinary.*

PARTNERSHIP.

1. One partner, after the dissolution of the copartnership, cannot bind the other, by signing the partnership name, without express authority; and notice through the public papers, to the plaintiffs, of such dissolution, is sufficient. *Galliott & Lefevre* ads. *P. & M. Bank*, i., *209..... 136

2. Each renewal of a note in bank, is a new contract..... *Ib.*

3. One co-partner cannot bind another, by an obligation under seal, without express authority given, or inferable from their course of dealing. *Lucas* vs. *Sanders & M'Alilley*, ii., *311..... 203

4. Neither can a recovery be had against one, upon a paper purporting to have been made jointly, as upon a joint and several obligation..... *Ib.*

5. A promise by one co-partner, after dissolution of partnership, cannot create a new liability against the other partner, on a simple contract, barred by the Statute of Limitations before the dissolution. *Steele* vs. *Jennings & Beaty*, i., *297..... 194

PATROL. See *Courts Martial*, 1, 2, 3.

PARTNERS.

1. Where grain received at a mill as toll, was mixed up, and became the subject of traffic between the defendants, each being part owner and interested in the proceeds of the sale: It was held that they were partners in that particular business. *Benson* vs. *McBee & Alexander*, ii., *91..... 406

2. The general rule of law is, that partners are bound by the acts of each other; and where one of a law partnership obtained the possession of a letter, (containing an authority to take care of the interests of the plaintiff,) directed to the other partner, and acted under the instructions contained in the letter, it was held, that the plaintiff was bound by the act of the partner, as much so as if he to whom the letter was directed had received it, and acted upon it. *Beck* vs. *Martin*, ii., *260..... 515

3. Where the sealed note of one of a partnership firm is taken for a debt due by the firm, the simple contract of the partnership is extinguished by the sealed note. *Jacobs* vs. *McBee & Alexander*, ii., *348.. 570

PAYORS. See *Bills of Exchange, Notes and Bonds*, 3.

PLEA IN BAR. See *Joint Trespassers*, 1.

PLEAS AND PLEADING.

1. Upon the "*non est factum*" solely, a defendant cannot go into evidence of the failure of the consideration. He must give notice to the plaintiff of such matter. *Vide Bolinger* vs. *Thurston*, 2 Mill's Const. Rep. 447; and 1 Hill, 370. *Ragsdale* vs. *Thorn*, i., *335..... 218

2. Wilful misrepresentation, or any other matter will go to show

that a bond, note, or other instrument, was void in its creation, may be given in evidence under the general issue..... 218

3. Where a declaration contains an averment that is foreign to the issue, and which may be rejected as surplusage, it need not be proved. But every material averment must be proved. *Bell* vs. *Lakin*, *364.. 237

POSSESSION. See *Trespass to try Titles*, 1, 2, 3, 10, 11, 12. See *Statute of Limitations*, 9, 10.

1. Although an actual possession of twenty years will raise the presumption of a grant, yet, where the plaintiff made a survey of many contiguous tracts, with the intermediate and dividing boundaries distinctly represented on the plat, doubted whether a possession of twenty years on one only of the several tracts, would raise the presumption of a grant to all the lands included within the survey. *Alston* vs. *McDowal*, i., *444..... 293

2. In such case a plaintiff cannot rely on a possession of twenty years on one of the tracts, to raise the presumption of a grant to himself of all the lands contained in the survey, when he produces original grants to others for several of the tracts, (being those in dispute,) of a date anterior to the commencement of his possession..... *Ib.*

3. The defendants being in possession of these, and the plaintiff having produced the original grants, he must show that he has acquired the title of the grantees by conveyance, by adverse possession, or such possession, with other proof, as would raise the presumption of a conveyance..... *Ib.*

4. An entry for the purpose of survey, will not create the bar of the statute; nor will such entry, together with the possession of the grant, without other proof, raise the presumption of a conveyance from the grantees..... *Ib.*

5. The defendants being in actual possession of the tracts so granted, of which the plaintiff never had possession: *Held*, That the plaintiff could not recover without proof of title..... *Ib.*

POST NUPTIAL AGREEMENT.

1. Where there has been a post-nuptial agreement, between two parties, and a deed of trust is executed, (to a third party as trustee) of certain slaves, for the use and benefit of both husband and wife, during life, upon the death of either, to the use of the survivor, and after the death of both, to the use of the children of the marriage, with a power to sell and re-invest, at the request of husband and wife, or the survivor of them; and after the death of the wife, the trustee, at the request of the husband, sold the slaves and conveyed them to the defendant—It was held, that the purchaser's title was good. That the trustee had not only the legal estate in the property, but he had the power to sell, and at law, the title could not be disputed. *Pyron, et ux.*, vs. *Mood*, ii., *281..... 528

PRIMA FACIE EVIDENCE. See *Administrator*, 1, 2.

PRISON BOUNDS' BOND.

1. A Prison Bounds' Bond becomes forfeited, against all the parties to it, when the principal forfeits his rights to the benefit of the law under which it was taken; and the liability of the securities is fixed, as soon as the plaintiff acquires his right to the bond by assignment. *McCarley, Ex'or.* vs. *Davis, et al.*, i., *34..... 22

2. The amount of recovery is the amount of the debt on which the defendant was confined..... *Ib.*

PRISONER.

1. A prisoner, confined in jail under execution of mesne process, is bound to maintain himself, so long as he has the means; and where a

sheriff or jailer has in his custody a prisoner, confined either under execution or final process, before he can recover pay for the maintenance of such prisoner, from the plaintiff at whose suit the prisoner is confined, he must show that the prisoner has no means of paying his jail fees, and nothing out of which he can be supported. *Thomasson* vs. *Kerr*, ii., *340..... 565

PRIVATE FERRIES.

1. The owner of a private ferry may so use it, (although on a road not opened by public authority, or repaired by public labor,) as to subject himself to the liability of a common carrier, if he undertakes for hire, to convey across the river all persons indifferently, with their carriages and goods. But this is a question of fact, to be determined by a jury, and when once passed on by a jury, will not be disturbed, unless for misdirection in the Judge who heard the cause. *Littlejohn* vs. *Jones*, ii., *365..... 581

PROBABLE CAUSE. See *Action on the Case*, 2.

PROHIBITION.

1. Where a detachment of the militia of the fourth brigade, South Carolina Militia, had been detailed, (by the brigadier-general of the brigade,) as a fire-guard, in the City of Charleston, under the Act of 1829, and before their term of service as such guard had expired, the officers and sergeants belonging to this detachment, together with all the officers, &c., composing the said brigade, had been ordered by the brigadier, under orders from the Governor of the State, to encamp and perform encampment duty—It was held that the fire guard and encampment duties did not conflict; and a prohibition to restrain the collection of fines imposed by the court martial *against the relators*, for a neglect of the later duty, was refused. *Ex. rela. Oakley et al.* vs. *Edwards et al.*, i., *215..... 140

2. A writ of prohibition will lie, to restrain the enforcement of a tax execution. *Burger, Tax Collector*, vs. *Carter, ex rela.*, *410..... 267

PROMISSORY NOTE.

1. Where a party writes his name on the back of a promissory note, payable to a third person, not yet due, without express words to show the nature of his contract, he will be held as an original promissor.

2. It seems the undertaking will be regarded as original, and not collateral. *Stoney* ads. *Beaubien*, ii., *313..... 548

PUBLIC SALES.

1. Defendants, executors of Dr. Green, late of Columbia, after advertising a sale of the negroes belonging to the estate of their testator, to take place in the town of Columbia, on a certain day: on the day appointed, by previous notice, proceeded to sell the negroes, at public outcry; but before offering any of them for sale, announced publicly, and advertised the bystanders, that they did not warrant the soundness of the slaves; but did the genuineness of the title. *Held*, That this was a sufficient notice to exonerate and exempt the executors from a recovery against them, on an action for an implied warranty of soundness—also, *held*, That the *onus* did not lie on the defendants, to prove whether the plaintiff heard or was aware of the terms of the sale, or not. *McLean* vs. *Executors of Green*, ii., *17..... 361

QUARE CLAUSUM FREGIT. See *Court of Ordinary*.

QUANTUM MERUIT.

1. Plaintiff was employed by defendant, to make a crop with him, in 1839, and was to receive for his services one fourth of the crop made. About the last of August, a misunderstanding arose.

Plaintiff was dismissed, and in September following commenced this action: *Held*, That plaintiff, by commencing his action in September, after he was dismissed, treated the contract as being rescinded, and has waived his right to recover entire damages for the whole year; and has restricted his right of recovery to a compensation for his services on a *quantum meruit*. *Watts* vs. *Todd*, i., *26..... 17

RAILROAD COMPANY.

1. The Railroad Company are not liable to one of their agents for an injury arising from the negligence of another competent agent. *Murray* vs. *S. C. R. R. Company*, i., *385..... 251

2. Where the slave of the plaintiff, endowed with ordinary intelligence, and acquainted with the nature and manner of using the railroad, voluntarily laid himself down on the road and went to sleep, amidst grass so high as to obstruct the view at some distance, (over twenty feet ahead,) and in this situation, without any fault of the engineer, the engine, going at its ordinary speed, passed over the body and killed the slave: It was *held*, That the plaintiff could not recover against the company for the price of the slave killed, under the circumstances, and ordered a nonsuit. *Felder* vs. *Railroad Company*, ii., *403..... 604

RAVISHMENT OF WARD. See *Slaves and Free Negroes*, 1.

REPLEVIN BOND. See *Bond*, 2.

REPLICATION. See *Demurrer*, 2.

RULE OF COURT. See *Nonsuit*, 1, 2.

SATISFACTION. See *Levy*, 1, 2.

SCIRE FACIAS.

1. Where a *verdict* has been obtained against two defendants, upon a joint and several promissory note, and judgment has been entered up against both, and upon *appeal, a new trial* is ordered, *unless* the plaintiff discontinues as to one of the defendants: *Held*, That the plaintiff should discontinue before "*scire facias*" is brought. *Kennerly* vs. *Walker*, i., *117..... 78

2. To permit a discontinuance of one defendant to a record to be entered on the trial of a "*scire facias*," upon the plea of *nul tiel record*, would be irregular..... *Ib.*

3. A general demurrer to a special replication to the plea of "*nul tiel record*," will be sustained, unless the replication denies the plea.. *Ib.*

SEAL.

1. Any letters, such as "L. S." or a circumflex scroll, made by a party in connection with the words "*sealed*," or "witness my hand and seal," or proved by evidence *aliunde* to have been intended as a seal, will constitute a valid seal. *McKain* vs. *Miller*, i., *313..... 204

2. The intention of a party, where the letters "L. S." are annexed to his signature, is properly a question of fact for a jury to decide.... *Ib.*

SHERIFF.

1. Where goods have been levied on by a sheriff, under executions in his hands, and before they are sold, a writ of foreign attachment against the same defendant is lodged in his office, he may levy the attachment also on the goods; and this is not such a case, where the property or fund is protected by being in the custody of the law. *Day* vs. *Becher*, i., *92..... 62

2. Merely lodging a writ of attachment in the sheriff's office, is not sufficient to attach the property or fund in his hands; but the Court

will permit him to accept service, even after rule and cause shown—*nunc pro tunc*..... 62

3. Where a sheriff has collected money under execution in favor of the plaintiff, and before a demand is made on him by plaintiff to pay over the money, he receives written notice from the attorney of certain attaching creditors not to pay over, but to retain the sum collected in his hands—that they intend to file a suggestion to set aside the plaintiff's judgment and execution, as fraudulent and void. *Held* that the sheriff was legally justified in retaining the money. *Thomas* vs. *Yates*, i., *179..... 118

4. If there are conflicting claims to money collected by a sheriff, and he recives notice and acts fairly and bona fide in the matter—does not use the money himself, but deposits it in bank to await the ultimate decision of the Court—he does not subject himself to the penalty of the Act of 1796..... *Ib.*

5. The Act of 1796 is somewhat penal, and should be construed with strictness in favor of the party to be effected by it..... *Ib.*

6. A sheriff is bound to show, where he is sued under the Act, that he has acted fairly and in good faith, and that the money has not been detained for false purposes..... *Ib.*

7. A sheriff's execution book is, on account of its official character, received in evidence, as proving in general the official entries contained in it. So, too, an entry on an execution is admissible in evidence as part of the record. *Secrest* vs. *Twitty* i., *255..... 167

8. The entry of the sale made by the sheriff, containing the name of the purchaser, is as effectual a signing, as if the sheriff had written the name of the purchaser to a formal contract..... *Ib.*

9. A sheriff cannot be relieved from an attachment issued against him, nor can he have it dissolved, unless he can show that he has used all the means in his power, under the execution against the defendant to obviate and repair the consequences of his former default; and that the loss to be suffered, did not arise from his negligence, but from the absolute insolvency of the defendant. *Pittman & Day* vs *Clarke*, i., *316..... 206

10. The Act of 1839, regulating the office and duties of sheriffs of this State, and dispensing with the return of "*nulla bona*" heretofore required against sheriffs, before commencing actions on their official bonds against the securities, does not do away the necessity of the return of "*nulla bona*" where the sheriff was elected and gave bond before the passage of the Act of 1839.

11. The Act of 1839 is prospective, and applies only to those sheriffs who have been elected and given bond since its passage.

12. Where the sheriff, making the returns of executions in his office, to the clerk of the Court, previous to each Court, as required by law, omits to make the proper return, he will not be permitted to make it subsequently, "*nunc pro tunc*." *The State* vs. *Wylie, et al.*, ii., *1... 351

13. After the lapse of twenty years, the conditions of a sheriff's bond will be presumed to have been performed. *Treasurers* vs. *Executors of McPhearson*, ii., *69..... 392

14. A sheriff is bound to take notice of the liens in his office, and to pay money collected by him under official authority, to the oldest execution. And when he pays money to a junior execution, he does so at his own risk, and he will be held liable for the consequences, either by rule or action at law. *See Act* 1839, 21 *sect.* 30, *defining sheriffs' duties.*

15. When there is a contest for money, collected by a sheriff in his official capacity, he is a stakeholder and must hold his hand (but in

good faith and without collusion with either party) until the adverse claims are subjected to adjudication.

16. A rule will always go where the legal rights of the parties can be made to appear from a conceded statement of facts. But where the facts are disputed, and the law depends on their developement, the parties should be left to their action at law, or an issue will be directed at law to try them. *Cooper* vs. *Scott*, ii., *150..... 446

17. On a suggestion filed against a sheriff, (after judgment has been obtained against him on his official bond,) suggesting other breaches of his bond, he may plead double if he chooses, but he cannot traverse and demur both, to the same portion of the suggestion.

18. Whatever a sheriff does, or omits to do, in his official character as a public officer (under the Act of 1829,) properly recognized, whereby damage results to another, seems to be a violation of the duties of his office, and the damage proved may be recovered under the bond. Fees improperly charged, constitute such damage; but a penalty or forfeiture given to the party injured, for his more ample reparation, and for the punishment of the sheriff, seems not to be damage but rather a chance of gain, which, by increase, the law bestows upon the sufferer; such penalty or forfeiture may be recovered against the sheriff by suit, "in which no imparlance shall be allowed," but does not constitute such a demand as may be recovered under the bond, against the sheriff and his sureties, for his breach of official duty. *Treasurers* vs. *Bucknor, Sheriff*, ii., *323..... 554

19. Where a sheriff has no process giving him authority to receive money, a person who pays to his deputy cannot look to him. And where one, deceived by no show of authority, pays money to J. S. himself, then being sheriff, that which the sheriff has not authority to receive, J. S. personally is liable for, and not the official bond of the sheriff. But should the sheriff, having writs which authorize him to collect, exact from the debtor more than was lawfully required, even without levy, the payment is not voluntary, and it is a violation of his official bond. *Ibid.*, ii., *327..... 557

20. A sheriff cannot recover, (in an action of assumpsit,) from a purchaser at sheriff's sale, for property purchased, where the purchaser is the owner of the execution in his office entitled to a preference from the proceeds of sale, unless he can show that a part of the money arising from the sales was applicable to the payment of his costs, and then only the amount of his costs.

21. When one being the owner of an execution, under which the sheriff sells, purchases property at the sheriff's sales, upon an action of assumpsit against him by the sheriff for the amount of his bids, he cannot avail himself by way of discount of the amount of his execution in the sheriff's office, although his execution is entitled to the preference in the sales. *Cobb* vs. *Pressly, Sheriff*, ii., *416..... 612

SHOP KEEPER. See *Evidence*, 5.

SLANDER.

1. On the trial of an action for slander, the defendant will not be permitted, under the plea of the general issue, to prove the truth of the words spoken, or any fact which will go to criminate the plaintiff. The plea of justification, in order to prove the truth of the slander, must always be pleaded. *Eagan* vs. *Gantt*, i., *468..... 313

2. In an action on the case for slander in charging the plaintiff with perjury, the *colloquium* stated in the declaration set forth the trial of an indictment for a riot; the record produced on the trial was for a riot and assault; held, to be an immaterial variance.

3. So, a slight variance in the names of the defendants in the indict-

ment, as set out in the declaration and contained in the record, may be cured by parol proof of the identity of the persons. *Hamilton* vs. *Langley*, i., *498..... 338

4. In an action of slander, where the words spoken were, that the "plaintiff had sworn falsely in giving evidence, before a certain Justice Johnson, in a trial heard before him," it is not necessary to aver in the declaration, that the Justice had jurisdiction of the cause in which the plaintiff was sworn as a witness, or that his testimony was material. Both of these are presumed, until the contrary appears.

5. If there be a *colloquium*, [prefatory averment. *Au.*] referring to the trial of a cause before a Justice, in which the plaintiff was examined as a witness, and in it, it is averred, that the defendant, speaking of such trial and testimony, spoke the same words, they would be actionable. They impute a false swearing, in a court of justice, which, *prima facie*, imports perjury. If these general facts so averred be proved, it is enough on the part of the plaintiff.

6. It is the right and duty of a Judge, to instruct the jury fully upon the law arising out of the facts proved—and in an action of slander, where the defendant had charged the plaintiff with having sworn falsely before a Justice, in a certain trial in which the plaintiff was examined as a witness, the defendant, on the trial of the case, had the right to have the jury instructed, whether the evidence of the plaintiff before the Justice, was immaterial to the point in issue, or not. And upon the refusal of the presiding Judge so to instruct the jury, a new trial was granted. *Dalrymple* vs. *Lofton*, ii., *112..... 419

SLAVES AND FREE PERSONS OF COLOR.

1. Under the Act of 1740, any negro claiming to be free, has the right, by guardian, to bring an action of trespass in the *nature of ravishment of ward;* not only against any one claiming property in, but against any one having the possession of such negro. *Wesner* ads. *Guardian Tom Brister*, i., *135..... 89

2. Where one in his lifetime was seized and possessed of certain slaves, to wit:—"Henrietta and her four children, Charlotte, Francis, Nancy, John, and Elizabeth, and also Tilly and Mary"—and by deed bearing date 26th February, 1830, for a nominal consideration, assigns to the defendants, P. & C., the said negroes, Henrietta, and her four children (as above named) on the special trust, confidence and condition, that they will, from time to time, and at all times hereafter, permit and suffer the negroes above named, or any or all of them, and also the future issue and increase of the females, to seek out and procure employment, and to work for their own maintenance and support; and further in trust to allow them the said negroes, &c., to receive and take for their sole use and benefit, all such moneys as they might obtain for their labor or otherwise, after paying to the trustees the sum of one dollar per annum and no more. The other deed purports to convey to the same trustees the slaves Tilly and Mary, in trust, to apply their labor to the use of Henrietta and her children as aforesaid, until her youngest child shall come to the age of twenty-one years, and then to sell the slaves Tilley and Mary, and divide the proceeds between Henrietta and her children, share and share alike. *It was held—*

3. That the deeds were good, and sufficient to vest the title to the slaves in the defendants. That the negroes mentioned, viz.: Henrietta and her children, are still slaves under the dominion of their masters, and must so remain.

4. That if the defendants should give them, under the deeds, the fruits of their labor, it is not unlawful.

5. That the second deed is a good common law conveyance to the defendants, of the two slaves, Tilly and Mary, for the use of other slaves.

6. That by the laws of this State, slaves may acquire and hold in possession personal property (not prohibited to them by Act of the Legislature) with the consent of their masters or mistress. And such property is in law to be regarded as the property of the owner of the slave. *Carmille* vs. *Administrators of Carmille*, ii., *454..... 635

7. A free person of colour, by the laws of this State, may take and hold, convey by deed, dispose of by will, or transmit to his heirs at law, both real and personal estate.

8. A slave may acquire property, but as he cannot hold, it inures to the master.

9. Freedom, when bestowed upon a slave by will, is usually spoken of as a legacy, which requires the assent of the executor, or other bequests. But, should the executor withhold his assent to the legacy of freedom to the slave, the heir at law cannot retain him in slavery—for upon the death of the testator, his right of freedom vests, subject only to be held by the executor liable for the demands of creditors.

10. After the lapse of twenty-eight years, the assent of an executor to a legacy of freedom will be presumed, and the claim of creditors satisfied or barred; and the possession of the slave (so bequeathed her freedom,) of a tract of land also devised to her by the testator, and which she held undisturbed and in quietness, is sufficient to give her a title to said land, as a free person of colour, against the heir at law, and all the world.

11. By the Act of 1824, it is enacted, that every "gift of land by devise shall be considered as a gift in fee simple, unless such construction be inconsistent with the will of the testator, expressed or implied." The word "*hereafter*" in the *first part of the section*, is held to relate to the time of adjudication, in connection with the word "*considered*," and not to the date of the devise.

12. Where the testator by his will devises in consecutive clauses, 1. To Judith, then to Barbara, each one half of certain lands containing ——— acres, to themselves for life, with the power of disposing, and in default with remainder over. And afterwards by a codicil to said will uses the following language. "I do hereby revoke that part of my will wherein I bequeathed to the within named Judith and Barbara, the three tracts of land between them," and afterwards continues, "I bequeath to the said Judith, the place whereon she now lives, adjoining John Newman's land, containing three hundred acres, under the *contingencies, limitations and restrictions, mentioned in my said will*," *and* "I revoke that part of my *said will*, wherein I leave to the said Barbara that land below Silver Bluff, being a part of three tracts of land, and in lieu thereof, I leave her that whole tract adjoining the point, containing upwards of three hundred acres, the lowermost part of said land. The land between the two parcels I left to the said Judith and Barbara, I leave to the said Thomas, son of the said Rachel Dupre."

13. It was held, that the devise to the said Barbara in the codicil was not merely a substitution of one tract of land for another, to be held by her for life only, and subject to the limitations of the original devise to her by the will of the testator, but was a devise in fee. *Bowers* vs. *Newman et al.*, ii., *472..... 646

STATUTE OF FRAUDS.

1. The parol promise of a party to pay the debt of a third person, or to sign a note with him as security, is a collateral undertaking, and

void, under the statute of frauds. There is no distinction between a promise made before and after the delivery of the goods. The promise, in order to charge the party, must be in writing. *Bronson* vs. *Stroud*, ii., *372..... 585

STATUTE OF LIMITATIONS.

1. Possession and the payment of the purchase money is a good equitable title, and a possession of ten years under such a title is good under the Statute of Limitations. *Ellison* vs. *Cathcart*, i., *5..... 3

2. After the Statute has run out, there must be "an express promise to pay, or an admission of a subsisting debt which the party is willing and liable to pay." *Horlbeck* vs. *Hunt*, i., *197..... 129

3. Whether the acknowledgment proved is sufficient to take a case out of the statute, is a question for the Court, and not one of evidence or construction for the jury..... *Ib.*

4. The admissions by the defendant, within two year from the commencement of the action, that the cotton of the plaintiff's intestate was shipped on board of his steamer, that it had been destroyed by fire, and that the controversy as to his legal liability was still pending, was held not to be a sufficient admission of his liability, on which the law would raise an implied promise. *Administrator of Patton* vs. *Magrath*, i., *212..... 138

5. The cause of action in this case accrued on the 3d December, 1832, and suit was brought by the plaintiff's intestate in May, 1833, and abated, before it was tried, by his death. In March, 1835, suit was renewed by the plaintiffs, and at February Term, 1839, of the Appeal Court, a nonsuit was ordered. In April following, this suit was commenced: *Held*, that the Statute of Limitations was a bar to plaintiff's recovery. That this suit could not be connected with either of the former cases..... *Ib.*

6. A defendant is not precluded from availing himself of the Statute of Limitations, by the remark of his counsel, in argument, "that his client would scorn to take advantage of the statute, if it could be made to appear that the money had been applied to the business of the firm." *Steele* vs. *Jennings & Bealey*, i., *297..... 194

7. Where there is a plaintiff who can sue, and a defendant who can be sued, the Statute of Limitations begins to run. *Bugg* vs. *Summer*, i., *333..... 217

8. The Statute of Limitations is not suspended during the time that elapses between the death of an administrator and the administration *de bonis non*..... *Ib.*

9. The possession contemplated by the Statute of Limitations, must not only be notorious and definite at one period, but it must, in some form, be continuous, during the statutory time: that is, it should be definitely used, for some purpose, for ten years. *Porter* vs. *Kennedy*, i., *354..... 230

10. Although "*possessio pedis*" does not require actual occupancy, it implies enclosure, and use of the grounds enclosed..... *Ib.*

11. The enclosing and sowing down a small turnip patch on a tract of land, and occupying it but for one year, and occasionally cutting and hauling from it fire wood and other timber, will not be sufficient to defeat another, or give a title to land, under the Statute of Limitation..... *Ib.*

12. The possession of a small slip of land, for ten years, (adversely,) with a fence, will give a good title to the land, under the Statute of Limitations. *Smith* vs. *Pickenpack*, ii., *72..... 394

13. The Statute of Limitations will run against the title to lands, claimed by a corporate body, such as the Camden Orphan Society. *Camden Orphan Society* vs *Lockhart, et al.*, ii., *84..... 402

14. Where one of two parties, of joint contractors, was served with a writ in the State of New York, and judgment by the statute of New York was obtained against both; afterwards, suit was brought in South Carolina, against the party not served. *Held*, that the defendant in South Carolina was not concluded by the recovery in New York; that it was only *prima facie* evidence of the extent of his liability, but that he might avail himself of any defence which he might have had to the original cause of action. It was further held, that the judgment, outside of New York, was the same as if no judgment had there ever been pronounced against the defendant, not within her jurisdiction; that the party must fall back on the original cause of action; and that the Statute of Limitations, which is the "*lex fori*," would then be a bar to the plaintiff's cause of action. *Menlove* vs. *Oakes*, ii., *162. 453

15. Plaintiff, one of the brothers of Francis Sams, (deceased,) paid to the defendant, attorney for the executors of the late Gov. Hopkins, of Georgia, $815, who, it appears, had a judgment against the said Francis Sams, for $1,031.31, with interest from 18th February, 1818, besides costs. At the time of the payment of the money to defendant by plaintiff, a compromise was effected between them, and this sum of $815, was to be considered as an entire discharge of the whole debt, or defendant was to procure from the executor an assignment of the case to plaintiff, as plaintiff might elect.

Subsequent to the date of the compromise, defendant, as attorney of the executors, assigned to plaintiff the case above alluded to, but plaintiff, after consultation with counsel, refused to accept defendant's assignment, as he was not the attorney in fact of the owner of the case, or even attorney on record in the case.

Defendant refused to become responsible for the amount paid, but promised plaintiff, that he would not pay over the amount he had received, until he procured an assignment to him from the executors of Hopkins. Some short time after this promise of defendant to procure the assignment of the case, or that he would withhold the money, defendant paid over the money to the executor, C. H. Hopkins. Under the circumstances of this case, it was held, first, that this was a personal undertaking on the part of the defendant, and was founded on a sufficient consideration. It was held, secondly, that the cause of action, which accrued to the plaintiff, on the non-performance of this personal undertaking of defendant, was barred by the *Statute of Limitations*. More than four years having elapsed, from the payment of the money by Rhett to Hopkins, and the bringing suit. *Sams* vs. *Rhett*, ii., *171 459

16. Where a demand is barred by the Statute of Limitations, nothing less than a direct promise to pay, and an acknowledgment of a subsisting debt, due and owing, and which the party is willing to pay, will take the case out of the bar of the statute.

17. The promise must be so explicit, that the extent of the party's liability will appear by the terms of the assumption. *Williamson* vs. *King*, ii., *505 668

SUGGESTIONS OF FRAUD. See *Commissioners of Special Bail*, 2, 5.

SUBPŒNA DUCES TECUM. See *Insolvent Debtors*, 6.

SURETY. See *Bills of Exchange, Notes and Bonds*, 6.

SURETY TO ADMINISTRATION BOND. See *Exec'rs & Adm'rs.*

SURVEYOR.

1. A surveyor acting under a rule of Court cannot be allowed for his representation of separate tracts, on his plat, when they are no part of the land claimed by the parties, and are merely put down on

the plat as boundaries or evidences of the identity of the location. He is only entitled to pay for one plat. But where the plaintiffs claim under two grants, and both are represented on the same paper, and also a grant or grants conflicting with those upon which the defendants rely, for each of these the surveyor may be allowed to charge. *Kershaw & Gilman* vs. *Stearns, et al.*, i., *73..... 48

2. Where there are several cases, all depending upon the same location, the surveyor is only entitled to pay for one plat..... *Ib.*

TAX ACT. See *Constitutional*, 1, 2.

TOWN COUNCIL. See *City Ordinances*, 2.

TRADING WITH SLAVES. See *Indictment*, 1.

TREASURER. See *Company*, 1.

TRESPASS.

1. It is a well settled rule, that for all acts done under color of legal proceedings, where the court has no jurisdiction, or where the proceeding is irregular, *trespass and not case* is the proper form of action. See *Harp. Rep.* 486, *McCool* vs. *McCluney*.

2. In an action on the case, where the plaintiff's declaration complained that the defendant caused an execution to be issued and levied upon his land and goods, and the same to be sold by the sheriff, and the money arising from the sale of the same to be applied to the satisfaction of the said execution; and averred that afterwards the judgment upon which the execution issued "was set aside and rendered of no effect, &c., and afterwards a verdict was rendered in the same case for the defendant (now the plaintiff,) whereby it was established that the said defendant, (now plaintiff,) was not in arrears, or in any wise indebted to the said defendant," by means whereof the said plaintiff was greatly injured, &c. It was *held* that the declaration did not contain such a cause of action, as that the defect could be cured by the verdict of the jury, and a motion in arrest of judgment was sustained. *Cooper* vs. *Halbert*, ii., *419..... 614

3. A party proving the declaration of another party, concerning a trespass which had been committed, has the right to prove and give in evidence all the expressions that were used in the conversation relative to the trespass at the time, as well on account of their being a part of the same conversation, as also, to show to the jury the spirit and feelings with which they were spoken

4. It is the right, and also the duty, of a Judge, to comment on all the evidence of a case to the jury, and in cases of complicated facts, to give to the jury the aid of his experience, discrimination and judgment, upon the evidence, as well as the law, so that he finally leaves the ultimate decision of all the facts to their judgment. This is the practice of all Common Law Courts, and such is the well settled practice in South Carolina. *Devlin* vs. *Killcrease*, ii., *425..... 618

TRESPASS FOR BEATING SLAVES. See also, *New Trial.*

1. To correct a slave with a whip, giving him but fifteen stripes, when he is found without his master's enclosure, with a ticket or permit, accounting for his absence, is held to be a beating and abusing, within the meaning of the Act of 1839. *Caldwell et al.* ads. *Langford*, i., *275..... 180

TRESPASS ON THE CASE. See *Trespass*, 1, 2.

TRESPASS TO TRY TITLE. See *Possession;* also, *Statute of Limitations*, 9, 10.

1. In trespass to try titles, where the defendant has not acquired

his possessions by a tortious eviction, or actual disseizin, the plaintiff must make out a perfect title in himself. *Young* vs. *Watson*, i., *449. 297

2. It is necessary to show that the land has been granted, either by the production of the grant, or by proof of such possession in the plaintiff, or some one from whom he derives title, as will authorize the presumption of a grant..... *Ib.*

3. A possession of sixteen years, which terminated in 1791, insufficient for that purpose; and the plaintiff producing no other title, was nonsuited..... *Ib.*

4. On a question of location, a new trial will more readily be granted, than in most other cases depending upon facts, in consequence of their near approach to questions of law.

5. Natural boundaries, in questions of location, are to prevail, unless there may be some doubt about them, and this doubt certainly removed by artificial marks. In such a case, the artificial marks will have effect, although of inferior degree.

6. Where a survey called for Dean's Swamp as a boundary, it was held, that the creek or main stream of the swamp was intended, and not the outer edge or margin of low, marshy land, that frequently bounds the main stream.

7. The declaration of a tenant, after he has aliened his right and interest in the land, is inadmissible evidence to prove where a line ran, or a tree stood. *Felder* vs. *Bonnett*, ii., *44..... 376

8. In an action of trespass to try titles to a tract of land, in order to give in evidence an attested copy of the deed, under which the party claims the land in dispute, it is only necessary to prove the existence of the original, and its loss. That it cannot be found after a diligent and proper search, with those who should have the possession of it. *Culpepper* vs. *Wheeler, et al.*, ii., *66..... 390

9. Where a plaintiff, in an action of trespass to try title, has discontinued his suit, he has no right to call upon a Judge to certify his plat, when he is not properly before the Court. The certificate of the Judge, if granted, would be *extra judicial*. *Heywood* vs. *Searson*, ii., *231..... 496

10. There is a material difference between proving a deed as a part of a chain of title, and introducing a paper as color of title to show the extent of a party's possession. In the first case it must not only be proved to have been in existence before the party acquires rights under it, but when it purports to be less than thirty years old, its execution must be strictly proved.

11. To admit a deed in evidence as an ancient deed, continuous possession under it for thirty years is not always necessary. A less period than this will suffice, if there has been no inconsistent possession to conflict with it. A deed being found in an office, recorded, may be sufficient evidence sometimes; and at all times such testimony may be received to show the antiquity of such a paper.

12. When a party indicates the boundaries of his land by stakes, for more than ten years, by which he shows the extent of his possession, and the boundary thus indicated is made known to the adverse party, who is interested to deny it, and they acquiesce therein, it is a good title to the land by possession, with a color of title. *Allen* vs. *Johnson*, ii., *495..... 561

TROVER. See *Bailee*, 2, 3.

1. The Act of 1827 makes the action of trover, commenced under its provisions, a proceeding *in rem.*; and when a writ is issued and served, the chattel is in the custody of the law and cannot be distrained for rent. *Seigling* vs. *Main*, i., *252..... 164

2. Plaintiffs brought an action of trover against defendant, for seven bales of cotton, part of a cargo shipped by them to their factors in Charleston, on board Michael Harkins' *Bay Boat, the Belle.* During the voyage the cotton thus shipped was damaged to the amount of $358 61 ; defendant detained the seven bales of cotton. under his lien as a carrier, for freight. The damage done to the cotton, exceeded the claim of freight. *Held*, among other things, 1st. That the factors, the consignees of the cotton, had no such interest as divested the plaintiffs of their right of action.

3. That where the injury done by the carrier to the cargo, exceeded the freight, to that extent the carrier's right to freight would be defeated.

4. That where the thing converted, is reduced to money, in the hands of the defendant, the smallest measure of damages in trover, is always the amount received from the conversion, with interest from the time of conversion. *Ewart* vs. *Kerr*, ii., *141..... 449

5. Defendants, (chemists) were in the practice of filling a certain soda fountain for one Hopkinson, who rented this and another fountain from the plaintiff. Hopkinson absconded, leaving the soda fountain in the possession of defendants, who had first filled it. Plaintiff brought this action of trover for the conversion by defendants. *Held*, that there was no such tortious conversion, as would enable plaintiff to sustain trover, and a nonsuit was ordered. *Parkerson* vs. *Simmons & Epping*, ii., *188..... 469

TROVER ACT, 1827. See *Bond*, 1, 3.

USURY. See *Bills of Exchange*, *Notes*, &c., 7, 8.

VAGRANTS.

1. The Act of 1836, in regard to vagrants, is held to be constitutional. *The State ex rel. Coleman* vs. *Maxey et al*, i., *501..... 341

2. The powers conferred on a Court of Justices by the Act of 1836, in regard to vagrants, is no violation of those parts of the Constitution which provide "that no man shall be deprived of his life, liberty, or property, but, by the judgment of his peers, or by the law of the land;" and that "the trial by jury, as heretofore used in this State, shall be forever inviolably preserved."..... *Ib.*

3. A proceeding for vagrancy under the Act of 1836, is not barred by a prosecution in the Court of Sessions for gaming..... *Ib.*

VARIANCE.

1. Writs of foreign attachment were issued against the defendant and Jane Reid, jointly—declarations against the defendant alone, suggesting Jane Reid to be the wife of defendant: *Held*, to be fatal on special demurrer.

2. It seems that the proper course of discontinuance, where two defendants have been joined in the same writ, is by leave of the Court to discontinue. Leave to discontinue will never be refused, but it must first be obtained. This is the usual practice, and this practice has good reason—so says the Court. *Lamar & Daniel* vs. *Reed*, ii., *346..... 569

VENDORS.

1. Defendant having about $4000, desired to invest it in Cotton for speculation. He accordingly applied to the plaintiffs, who were cotton brokers in the City of Charleston, and they purchased for him three hundred and sixteen bales ; procured an advance on their own responsibility of $12,470, to pay for the cotton so purchased; shipped it on board the Josepha, (a vessel designated by defendant,) and consigned it, according to the usages of trade, to a house in Liverpool. Subse-

quent to the sailing of the vessel, the defendant refused to complete the contract. Upon this refusal this action was commenced. Verdict for plaintiffs, $4000. *Held* that the defendant was liable to the plaintiffs as vendors; that there was a sale and delivery, and a new trial was refused. *Robertson & Gilfillan* vs. *Shannon*, i., *164..... 108

2. Where the vendor sends goods, with his price marked upon them, and they are accepted by the vendee, the law will imply that they were taken on the vendor's terms; unless it should appear otherwise, from the course of previous dealing between the same parties, or from some custom with which both were acquainted. *Mitchell & Co.* vs. *McBee & Irvin*, i., 267..... 175

VERDICT.

1. A verdict for a specified sum of money, "with interest thereon from the 16th February, 1836," is not void for uncertainty, either as to the principal sum or the interest; but the plaintiff is entitled to sign judgment for both, computing the interest according to the verdict; even if the demand be unliquidated. *Bank of the State S. C.* vs. *Bowie*, i., *429..... 281

2. Where the verdict of a jury is contrary to the weight of evidence in a cause, and against the established rules of location, a new trial will be granted. *Wolfe* vs. *Knotts*, ii., *75..... 396

3. After verdict, the Court will by intendment suppose everything to have been proved which the allegations of the record require to be proved; but where everything which constitutes the gist of the action on the case is omitted, the judgment will be arrested. *Cooper* vs. *Halbert*, ii., *419..... 614

VINEYARD. See *Agreement*, 3.

VOID PROMISE. See *Consideration*, 3; *Statute of Frauds*, 1.

WAIVER. See *Insurance Company*.

WARRANTY.

1. The plaintiff, in an action on the covenant of warranty of soundness, where there has been a recision of the contract, or where the property is dead or valueless, is entitled to recover back his purchase money and interest. And when he has offered to restore the property to the defendant, and he has refused to accept it, and the plaintiff is compelled to keep the property and incur expense on account of it, he may also recover such expenses. *Seibles* vs. *Blackwell*, i., 56..... 36

WAY—RIGHT OF.

1. The erection of a gate across a way, claimed by the plaintiff, which is opened and shut at pleasure by all who pass, is not such an obstruction as would have the effect to extinguish the plaintiff's right, or of barring him of his remedy, however long it may have been erected. *Barnwell* vs. *Magrath*, i., *174..... 114

2. A right of way, by prescription, implies an adverse use of the way for twenty years; and the party using the way, must use it as though he was exercising a right of property in himself, uncontrolable by the owner of the soil over which it runs. *Hogg* vs. *Gill*, i., *329..... 214

WITNESS. See *Evidence*.

1. The opinion of witnesses as to the existence of disease in a negro, who had not the aid of science to guide them, are inadmissible, unless sustained by facts showing the opinion to be true. *Seibles* vs. *Blackwell*, i., *56..... 36

2. The subscribing witness to a contract, whether under seal or not, must be produced to prove the instrument, if alive, and within the

jurisdiction of the Court. It is incompetent to prove it in any other way. *Trammell* vs. *Roberts, et al.*, i., *305..... 199

3. A question of credit between two witnesses, is to be left to the jury, and their finding will not be disturbed, notwithstanding it may be contrary to the views of the presiding Judge, expressed in his charge. *The State* vs. *Gunter*, i., *458..... 305

4. To discredit a witness, it is incompetent to offer testimony to prove that the witness has been guilty of stealing. *Free* ads. *The State*, i., *494..... 334

5. Where incompetent testimony has been received, and no objection is made at the time of its reception, counsel have the right to comment upon it before the jury..... *Ib.*

WRIT.

1. Where a writ was tested on the 4th day of March, 1842, and made returnable to the 3d Monday in March next, it was held that the 3d Monday in March might well indicate the 3d Monday after the test of the 4th of March, 1842, or the 3d Monday next after the 4th Monday of March. *Posey* vs. *Branch*, ii., *338..... 564

WRIT OF CAPIAS AD SATISFACIENDUM.

1. Defendant was arrested and in the custody of the sheriff by virtue of a *ca. sa.* at the suit of the Plaintiff, and had rendered in his schedule according to law, but refused to assign it. *Held*, that by his refusal to assign his schedule, he has not forfeited his right to remain within the prison bounds. *Davis* vs. *Ruff*, i., *1..... 1

2. A defendant arrested under a *ca. sa.*, who gives the usual bond, for the bounds, and without rendering in a schedule, or satisfying the debt, breaks the bounds, may, by Act of Assembly of 1839, be retaken; or, the plaintiff may proceed against the security on the bond: and if the security is insufficient he may have his action against the Sheriff, who shall be ultimately liable. *Murray* vs. *Peay*, i., *10..... 7

3. It is not necessary to have the order of a Court, in addition to the ordinary process of law, which the plaintiff has a right to have issued for the purpose of caption; but, if the sheriff should refuse to obey the usual process, the Court will, upon a rule, enforce it..... *Ib.*

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